Supreme Court, U.S.
FILED

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No. _____

IN THE

# Supreme Court of the United States

ALISON E. SHIMER,
*Petitioner,*

COMMODITY FUTURES TRADING
COMMISSION
*Respondent*

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Date: October 1, 2008

## QUESTIONS PRESENTED

1. Whether the availability of remedies in two District Court consent orders to members of an investor entity of which Petitioner was a member is sufficient "effectual relief" to avoid rendering moot Petitioner's appeal challenging the correctness of two separate District Court decisions excluding her from the benefit of those remedies.

2. Whether the "question of exceptional importance" standard of Federal Rule of Appellate Procedure 35(a) and IOP's adopted by the Circuit Courts of Appeal pursuant to that Rule justifies a refusal to grant review on the merits when appellate jurisdiction exists.

3. Whether the Third Circuit Court's denial of Petitioner's petition for review of the Panel's decision dismissing her appeal denied Petitioner her statutory right of appeal in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner here and the Appellant in the United States Court of Appeals for the Third Circuit is Alison E. Shimer, a citizen of the United States and resident of the Commonwealth of Pennsylvania.

The Respondent here is the Commodity Futures Trading Commission the federal agency civil plaintiff that alleged Petitioner's appeal to be moot and moved in the court below for dismissal of Petitioner's appeal citing to a previous similar motion to dismiss filed in the Appellate Court by Stephen T. Bobo, Esq. the District Court appointed receiver of the named defendants. Mr. Bobo's legal counsel Jeffrey A. Carr, Esq. entered an appearance on behalf of Mr. Bobo in the Appellate Court. Other parties to the civil action in the District Court that generated Petitioner's appeal are the corporate defendants Equity Financial Group LLC, Tech Traders Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd. Other parties are the individual defendants Vincent J. Firth, Robert W. Shimer, Coyt E. Murray and Vernon J. Abernethy.

Pursuant to Rule 29.6, Petitioner is not affiliated with any of the above stated corporate entity defendants. All of the above stated corporate entity defendants are privately held, are not owned by a parent company and are not owned by any publicly held company.

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Alison E. Shimer respectfully petitions this Honorable Court for a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Third Circuit dismissing her appeal on the ground that it is moot and rejecting her petition for rehearing.

## OPINION BELOW

The order of the Court of Appeals (App. 4a-6a) granting motions to dismiss Petitioner's Appeal was not reported. The denial of Petitioner's Petition for Rehearing (App. 7a-8a) was not reported. The two separate orders of the District Court (App. 12a and App. 17a-18a) appealed by Petitioner were not reported.

## JURISDICTION

The order of the Court of Appeals granting the motions to dismiss of both Respondent Commodity Futures Trading Commission and the District Court appointed receiver Stephen T. Bobo was entered May 20, 2008. Petitioner's petition for rehearing was denied and entered by the Court of Appeals July 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

**U.S. Constitution Amendment 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless he or she is on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the

same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**28 U.S. C. § 1291**
Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## STATEMENT

Subject matter jurisdiction for the District Court is found in Section 6c of the Commodity Exchange Act as amended (hereinafter "CEA"), 7 U.S.C. § 13a-1 (2002) which authorizes the Plaintiff Commodity Futures Trading Commission ("CFTC") to seek injunctive and other relief in the United States District Courts against any registered entity or other person that appears to be engaged in a violation of any provision of the CEA or any rule, regulation or order promulgated thereunder.

Petitioner was one of approximately 60 separate investors who placed funds with Shasta Capital Associates, LLC ("Shasta") a Delaware limited liability company managed by Equity Financial Group, LLC ("Equity") a New Jersey limited liability company. Shasta was formed as a limited liability company in the state of Delaware in May, 2001. Shasta's funds were, in turn, periodically placed pursuant to an investment agreement with the defendant entity Tech Traders, Inc. ("Tech") who conducted trading of commodity futures contracts solely in the name of Tech. Petitioner invested $150,000.00 with Shasta in September, 2003. The entity Shasta was one of several separate unaffiliated corporate entities that forwarded company funds directly to the defendant trading entity Tech for trading by Tech in the name of Tech.

Appellant's husband Robert W. Shimer was attorney for the defendant entity Equity and the non defendant entity Shasta. The defendant entity Equity was alleged by the Plaintiff CFTC to be a commodity pool operator (CPO) of the entity Shasta despite the fact that Shasta never engaged in trading and never represented to any of its members that Shasta intended to engage in commodity trading.

A civil action was filed on April 1, 2004 in the United States District Court for the District of New Jersey by the CFTC alleging various violations of the CEA. The Plaintiff CFTC's Amended Complaint filed August 12, 2004 alleged various violations of the CEA by the named defendant Equity as the manager of the entity Shasta. The CFTC alleged violations of the CEA and regulations thereunder by Petitioner's

husband Robert W. Shimer and Vincent J. Firth the manager of the defendant entity Equity. The CFTC alleged violations of the CEA and regulations thereunder by the defendant Coyt E. Murray ("Murray"), his trading company Tech and the other corporate defendants affiliated with Murray and or Tech: Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd. The defendant J. Vernon Abernethy, ("Abernethy") a CPA local to the trading operation of Tech hired by Murray to verify Tech's monthly trading performance was also alleged by the CFTC to have violated the CEA and regulations thereunder.

The defendants Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Murray and Abernethy all settled with Plaintiff CFTC and executed consent agreements with the CFTC later reflected in consent orders issued by the District Court. (App. 19a-60a) The defendants Equity, Robert W. Shimer and Vincent J. Firth all refused to enter into any consent agreement with the Plaintiff CFTC.

Stephen T. Bobo, Esq. ("Receiver") was appointed to be the receiver of all the named defendants and with the District Court's approval initiated an investor claim process in August, 2004. As an initial step the Receiver distributed claim forms to all persons believed to have been a member of the non-defendant entity Shasta that placed funds with the defendant trading entity Tech.

Beginning in early 2005 (and consistently thereafter) the Receiver opposed Petitioner's claim to be included in distributions to investor members of the entity Shasta and filed a motion to that effect with the District Court. Following a number of filings in the District Court by both the Receiver and Petitioner which addressed the merits of her claim and not the specific questions currently presented by this petition, Petitioner filed a letter with the District Court on August 18, 2005 (App. 61a) in which she consented:

> "...to defer any further consideration by the Court of my claim (Claim No. 67)....until such time as the Court rules on the two motions to dismiss previously filed by my husband in this matter currently pending before the Court and until such time as the Court also rules with respect to my husband's current motion for summary judgment also pending before the Court."

This case saw numerous pretrial motions including two separate motions for summary judgment--one filed in July, 2005 and the other in April, 2006 by Petitioner's husband Robert W. Shimer and Vincent J. Firth requesting summary judgment with respect to *all counts* of Plaintiff's amended complaint. These summary judgment motions were denied by the District Court. A trial occurred on the merits in late August and early September of 2007 and the District Court entered final judgment in favor of Plaintiff CFTC in February, 2008.

Petitioner's husband Robert W. Shimer, Vincent J. Firth and the entity Equity (defendants that did not settle with the CFTC) all appealed separately to the Third Circuit Court of Appeals the denial of summary judgment with respect to all counts of the CFTC's Amended Complaint and the entry of judgment for the CFTC. These appeals (consolidated by the Appellate Court) cited to the fact that these decisions of the District Court were apparently supported by no previous federal case law precedent and were, in fact, contrary to federal appellate case law that specifically addressed the pivotal issue of whether the non defendant entity Shasta qualified as a "commodity pool" as alleged by the CFTC. That consolidated appeal is now pending in the Appellate Court.

On November 13, 2007 the Receiver filed a motion with the District Court seeking a final determination with respect to his objection to Petitioner's claim. In that motion the Receiver proposed to the District Court that Petitioner's claim be disallowed *in its entirety* prior to his proposed final distribution of receivership funds. Plaintiff CFTC joined in the Receiver's motion. Petitioner filed an opposition to the Receiver's motion to disallow her claim. The Receiver filed a reply and Petitioner responded. All of these filings addressed the merits of Petitioner's claim to be included in the list of investors entitled to a final distribution of funds held by the Receiver for the benefit of members of the entity Shasta. The merits of Petitioner's claim are not an issue in this petition.

On or about Monday December 10, 2007 Petitioner received a voluminous package by regular U.S. mail from the District Court containing six orders some with attached exhibits signed by U.S. District Judge Robert B. Kugler. The first district court order in that package was the 34 page Entry No. 580. That Entry was composed of the District Court's two page order signed on December 3 and entered December 4, 2007 (App. 9a) and five attached exhibits. That two page order authorized the Receiver "...to make a final distribution of receivership funds to Tier 2 investors with Shasta Capital Associates, LLC..." consistent with the final distribution schedule attached to that order as Exhibit 2.

Paragraph 4 of that order (App. 10a) appeared to provide Petitioner reassurance that her claim had not been disallowed by the District Court because that paragraph 4 specifically stated: "The sum of $103,950 shall be held in reserve in the Shasta reserve account for the disputed claim of Alison Shimer consistent with the Final Distribution Schedule of Disallowed or Disputed Claims attached hereto as Exhibit 3".

A review by Petitioner of the first page of that attached Exhibit 3 [being the 21st page of Entry No. 580 (App. 11a)] clearly reflected the amount of $103,950.00 as a "Reserve Amount" which was the amount that Petitioner would be entitled to receive if the full pro rata portion of her claim was allowed (i.e. 69.3% of Petitioner's total claim). The referenced page one of that attached Exhibit 3 was, therefore, consistent with the language of the District Court

order to which it was attached transmitted by mail to Petitioner as a part of Entry No. 580.

Two other orders signed by Judge Robert B. Kugler were also included in the package received by Petitioner on December 10, 2007 identified in the District Court record as Entry No's. 582 and 583. These documents appeared to address solely the issue of awarding interim and final compensation to the Receiver, his attorneys and accountants and were, therefore, not relevant to the issue now presented by this Petition.

Also included in the documentation received on or about December 10, 2007 by Petitioner was a three page District Court order indentified in the record as Entry No. 584 (prepared by the Receiver Stephen T. Bobo) and signed by Judge Kugler on December 4, 2007 and entered and filed that same day (App. 13a). That District Court order terminated the receivership with respect to Petitioner's husband Robert W. Shimer and all other named defendants. The first Paragraph # 5 of that order reiterated that "The Receiver will continue to maintain an escrow account containing the funds reserved for the claim filed by Alison Shimer to be disbursed as directed by further order of the Court." (App. 14a)

On receipt of the package on December 10, 2007 and on review of the above two described District Court orders (Entries 580 and 584) Petitioner concluded that no final decision had been made by the District Court about the legitimacy of her claim. She failed to see Entry No. 581 (App. 12a) which was a one page order signed by Judge Kugler

on December 3, 2007 and entered on December 4, 2007 that *disallowed* Petitioner's disputed claim in its entirety. What is particularly confusing about the sequence in which all of these orders were issued and transmitted to Petitioner is the fact that the particular order identified as Entry No. 581 denying Petitioner's claim was signed by Judge Kugler *the day before* the previously referenced Entry No. 584 (App. 13a) which reiterated *for a second time* that funds representing Petitioner's claim would continue to be held in Reserve.

On December 10, 2007 Petitioner also failed at that time to see in the package sent to her the one page District Court order (Entry No. 585) (App. 17a) which referred to District Court order Entry No. 581. Entry No. 585 signed by Judge Kugler on December 5, 2005 and entered on December 6, 2007 ordered the Receiver to not hold the funds of Petitioner any longer in reserve but to "...place these funds with the other receivership funds for use in the final distribution".

The two one page District Court final orders [identified in the record below as Entry No. 581 (App. 12a) and Entry No. 585 (App. 17a)] effectively and with finality denied without discussion and without any explanation Petitioner's claim to participate with all other members of Shasta in the final distribution of funds held by the Receiver and contradicted Entries 580 and 584 which reflected a willingness of the district court to *defer* a final decision with respect to Petitioner's claim and to require the Receiver to continue to hold the funds representing Petitioner's claim in reserve.

Shortly after receipt of this correspondence from the District Court Petitioner again reviewed all orders received on or about December 10, 2007, became aware of the final denial of her claim by the District Court and filed a timely Notice of Appeal (App. 62a) soon thereafter on December 26, 2007. Petitioner also filed at the same time in the Court of Appeals a motion to stay the District Court orders identified as Entries 581 and 585.

Unknown to Petitioner the Receiver had already issued checks dated December 20, 2007 to the other claimants before the time she filed both her Motion to Stay and Notice of Appeal. The issuance of final distribution checks by the Receiver to all other claimants rendered moot the equitable remedy requested in Petitioner's motion in the Appellate Court for stay of the District Court's orders. The remedy of a possible motion for stay first in the District Court (as suggested by the Appellate Court) was also removed as a possible course of action for Petitioner in light of the fact that all final distribution checks had already been issued by the Receiver.

Petitioner filed a timely brief in support of the merits of her appeal upon receipt of the Appellate Court's Briefing and Scheduling Order dated and entered January 10, 2008 (App. 2a). Prior to the due date of Respondent's reply brief the Receiver filed a motion dated March 7, 2008 to dismiss Petitioner's appeal alleging constitutional and equitable mootness. The Petitioner filed a response dated March 11, 2008 to this motion by the Receiver. The Respondent CFTC also filed a motion to dismiss

Petitioner's appeal dated March 11, 2008 that referred to the Receiver's previous motion to dismiss and the Receiver filed a reply dated March 20, 2008 to Petitioner's response.

The Appellate Court Panel granted the Receiver's motion to dismiss by Order dated May 20, 2008 (App. 4a) citing first to the decision of this Court in *Church of Scientology of California v. United States,* 506 U.S. 9, 12 (1992) and then to the Third Circuit Court's decision in *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) for the proposition that jurisdiction no longer exists in the Appellate Court if a case has become moot.

Petitioner had argued in her response to the Receiver's motion that a favorable ruling on the merits of her appeal would provide her with a claim against the Receiver for his role in the District Court's erroneous denial of her claim and that remedy was sufficient to avoid a dismissal for mootness. The Panel disagreed and concluded (App. 6a) that any future claim by Petitioner against the Receiver was "hypothetical" and sufficiently "unidentified" to avoid grant of the separate motions of the Receiver and the Respondent.

Petitioner filed a timely petition for rehearing with the Appellate Court dated June 18, 2008 (App. 64a) asserting that however "hypothetical" that court might consider a possible claim by the Petitioner against the Receiver the existence in the record of the District Court Consent Order entered with respect to the defendant Murray (App. 19a-44a) and

the District Court consent order entered with respect to the defendant Abernethy (App. 45a-60a) provided the appellate court with the ability to grant her sufficient "effectual relief" to avoid application of the mootness doctrine and the consequent dismissal of her appeal for lack of appellate jurisdiction. That petition for rehearing was denied by the full appellate court on July 8, 2008. (App. 7a)

## REASONS FOR GRANTING THE PETITION

The right to seek and obtain timely appellate review of final district court decisions is clearly an important and fundamental right guaranteed to all federal litigants by 28 U.S.C. § 1291. Once such a statutory right to appellate review is conferred by Congress the denial of that right (with certain exceptions not relevant here) violates basic principles of fairness inherent in the concept of due process--that most basic constitutional principal protected by our judicial system.

To date Petitioner has not received what has been guaranteed to every litigant: appellate review of the merits of her claim when a timely Notice of Appeal is properly filed after entry of a final order of the District Court. The great irony in the present matter *and a further reason to grant this petition* is the fact that the denial of her right to appellate review was justified by the Appellate Court's cite to a decision of this Court that requires just the opposite result.

In addition to protecting that most important and basic "process" that is Petitioner's "due" the present petition asks this Court to reaffirm an important principal of federal jurisdiction this Court has steadfastly championed since 1821: that if jurisdiction exists in the Appellate Court, such jurisdiction *cannot* be refused. By not carefully considering controlling precedent of this Court to determine whether the appeal of Petitioner is truly moot the Third Circuit Court of Appeals exercised discretion with respect to the petition for rehearing it did not have--to refuse appellate review on the merits when jurisdiction exists.

Misapplication of the mootness doctrine strikes at that most basic and essential of all federal questions--federal jurisdiction. Federal jurisdiction existed in the Appellate Court to hear Petitioner's appeal under controlling decisions of this Court and Petitioner respectfully requests confirmation by this Honorable Court that the Third Circuit Court's denial of her petition for rehearing was an unjustified abuse of appellate court discretion.

## I. THE IMPACT OF MOOTNESS ON THE IMPORTANT FEDERAL QUESTION OF APPELLATE JURISDICTION CAUSED THIS COURT TO GRANT CERTIORARI 16 YEARS AGO IN *CHURCH OF SCIENTOLOGY OF CALIFORNIA V. UNITED STATES*

The precedent of *Church of Scientology of California v. United States,* 506 U.S. 9 (1992) exists because this Court was willing to grant certiorari to

clarify those instances in which federal appellate jurisdiction cannot be defeated by a claim of mootness that ignores the clear meaning of the "any effectual relief whatever" standard first enunciated by this Court in *Mills v. Green*, 159 U.S. 651 (1895). *Church of Scientology of California* now provides all federal appellate courts with clarification on the extent to which they should go to carefully determine if an "intervening event"[1] truly acts as a bar to appellate jurisdiction.

### A. The grant of this Petition offers the Court a similar opportunity

The first reason to grant this petition is that it offers this Court an opportunity very similar to the one presented by *Church of Scientology of California* to reiterate the importance of applying the *Mills* standard carefully to those circumstances when the grant of relief only *appears* to have been rendered impossible by a particular event. This petition offers the Court an opportunity to emphasize that when a timely petition for en banc rehearing raises the possible necessity of revisiting a panel decision denying jurisdiction the full appellate court is expected to look *carefully and thoroughly* at the arguments presented in that petition for rehearing to determine whether the doctrine of mootness can be applied to defeat appellate jurisdiction.

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[1] The fact that the "event" relied on by the Third Circuit Court in the present matter (the final distribution by the Receiver) was not technically "intervening" since it actually occurred prior to Petitioner's appeal clearly does not relieve that Appellate Court of the necessity of properly applying the required standard first enunciated in *Mills*.

The "question of exceptional importance" standard enunciated in Federal Rule of Appellate Procedure 35(a) & Third Circuit Court IOP 9.3.1 for determining whether to grant a petition for rehearing can never be applied in a way that appears to justify appellate court refusal to grant review on the merits when appellate jurisdiction exists.

It is true that a more persuasive argument for appellate jurisdiction was probably made in the petition for en banc review (App. 64a-82a) than in Petitioner's response to both Mr. Bobo's and the Respondent's motions to dismiss for mootness. But Petitioner's timely petition for rehearing offered her the opportunity to remind the Appellate Court that jurisdiction did, in fact, exist under controlling precedent of both this Court and precedent of the Third Circuit.

In that petition for rehearing en banc a clear and persuasive argument for appellate jurisdiction per *Church of Scientology of California* was made by the Petitioner for consideration by the full Appellate Court. That petition for rehearing provided the Appellate Court with a clear basis for distinguishing the Panel's cite to *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003).

There is no basis in the present circumstances for application of the rationale adopted by this Court in *Thomas v. Arn*, 474 U.S. 140, 148 (1985) when it cited to *United States v. Schronce*, 727 F.2d. 91, 94 (4th Cir. 1984) for the proposition that appellate review can be denied for an issue either not properly raised or timely raised in the District Court by virtue

of the inherent supervisory powers exercised by the Federal Circuit Courts of Appeal. [2]

Federal Appellate Rule 35 (a) that reflects the "question of exceptional importance" standard as contained in the Internal Operating Procedures of the various circuit courts of appeal similar to IOP 9.3.1 of the Third Circuit may not be applied to deny the very jurisdiction conferred by the statutory provision of 28 U.S.C. § 1291. As this Court pointed out in *Thomas v. Arn*, 474 U.S. 140, 148 (1985):

> "Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing'". *United States v. Payner*, 447 U.S. 727, 737, 199 S. Ct. 2439, 2447, 65 L.Ed.2d 468 (1980).

By refusing to grant the petition for rehearing and reconsider the Panel's dismissal of Petitioner's appeal as moot the full Appellate Court ignored both the letter and spirit of *Church of Scientology of California* and its significant clarification offered

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[2] In the present matter the District Court never held *any sort of hearing* with respect to the merits of Petitioner's claim that would have provided her with an opportunity to object to a specific issue or ruling and never provided any justification, reasoning or analysis for its decision to exclude Petitioner from the claim process in which other members of the entity Shasta were allowed to participate.

sixteen years ago for properly applying the *Mills* standard. Such appellate behavior by the Third Circuit Court should not be protected and allowed to stand under the guise of adherence to Rule 35(a) of the Federal Rules of Appellate Procedure and IOP 9.3.1. Certainly not when a federal question as significant as appellate jurisdiction itself is at stake.

**B. The willingness of the Third Circuit Court of Appeals to rely on an event that had little or no impact on its ability to fashion "effective relief" threatens an interest of greater *practical* significance to Petitioner than the interest of the church protected by this Court in *Church of Scientology of California v. United States.***

The intervening event [the turnover by a state-court clerk to the Internal Revenue Service (IRS) of two taped recordings of conversations between officials of the Church of Scientology and their attorneys in July 1980 which the church had sought to prevent IRS from obtaining] did not, according to this Court, prevent that Appellate Court from fashioning "...*some* form of meaningful relief in circumstances such as these." *Church of Scientology of California*, 506 U.S. at 12-13. Noting on that same page 13 that "(t)axpayers have an obvious possessory interest in their records" this Court concluded that "(w)hen the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records."

In the Panel Opinion dated May 20, 2008 (App. 4a) the Appellate Court clearly placed great weight upon the "event" of final distribution by the Receiver that occurred on December 20, 2007 when it noted that "(a)ll parties agree that the final distribution of receivership funds already has occurred without payment on appellant's claim." The Appellate Court then concluded:

> "If we were to conclude that the District Court erred in denying appellant's claim, the only effective relief that we could grant would be to direct the District Court to allow appellant's claim, recall the distribution from all other investors, and order a re-distribution that would include payment to appellant."
> (App. 5a)

But this petition does not present an instance (as pointed out in *Mills v. Green, supra,* 159 U.S. at 657 when it cited to the New York case of *People v. Clark,* 70 N.Y. 518 (1877) where the act sought to be restrained has been consummated. Petitioner's current appeal does not ask the Appellate Court to recall the intervening distribution by the Receiver. Petitioner by her appeal did not seek from the Appellate Court any equitable relief directed at the behavior of the Receiver and for that reason did not ask the Appellate Court to return her to a position *status quo ante.*

Petitioner sought a determination of the correctness of the District Court's decision that first excluded her from any interim or final distribution by the Receiver but also continues to effectively exclude her from any entitlement to participate in

future restitution payments required by the District Court of the defendants Murray (App. 37a) and Abernethy (App. 55a).

Petitioner acknowledged the impracticality and the impossibility of asking the Appellate Court to fashion equitable relief directed at the act of final distribution of receivership funds in December, 2007 by the Receiver. But as Petitioner's petition for rehearing clearly pointed out to the Appellate Court (App. 67a) the two consent orders issued by the District Court with respect to defendants Murray and Abernethy conferred a certain specific continuing and enforceable right and interest upon those members of the entity Shasta who were recipients of the final receivership distribution authorized by the District Court.

Petitioner also pointed out to the full Appellate Court in her petition for rehearing (App. 68a) that if her challenge to the correctness of District Court order Entry No. 581 and Entry No. 585 was sustained on the merits she would receive an immediate and *significant enforceable interest* in securing her ability to be made at least partially whole--a right and interest conferred by the Murray and Abernethy consent orders. That right and interest has significant economic benefit and is forever lost if the dismissal of her appeal is allowed to stand. Nevertheless, Petitioner's rehearing petition was denied without comment (App. 8a).

Petitioner by her appeal sought to be included in that group of investors entitled to further restitution by the defendants Murray and Abernethy

(to whatever extent full restitution is possible) that occurs after final distribution of all funds from the Receiver. The interest of an investor such as Petitioner to be made as whole as possible after being victimized by the fraudulent activities of others may not enjoy Fourth Amendment constitutional protection.[3] But such an interest is arguably of greater *practical significance* than the interest of a taxpayer to receive back tapes from a government agency after most of the damage caused by disclosure of the contents of the audio tapes in question has already occurred.

The interest protected by this Court's decision in *Church of Scientology of California* (the affront to a taxpayer's privacy) resulted in what might be considered a pyrrhic victory at best. Agents of the Internal Revenue Service had full and complete access to contents of the tape recordings before return of copies of those tapes was deemed by this Court to be a sufficient remedy under the "...any effectual relief whatever..." standard first enunciated in *Mills v. Green, supra,* 159 U.S at 653.

The right and interest *now* sought by Petitioner by virtue of the consent orders issued by the District Court would vest in Petitioner a right and interest with *great economic significance* for her. That right and interest was denied by the District Court without explanation or justification in the two orders of the District Court that are the subject of her appeal.

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[3] See *Church of Scientology of California v. United States, supra,* 506 U.S. at page 13, footnote 5.

The first "interest" of great economic significance for Petitioner is the ability to be admitted (after a review of the merits of her claim) to that group of Shasta members whose claims were granted by the District Court. While it is true that no funds exist at the moment for immediate restitution distribution to Petitioner, recognition of the legitimacy of her claim and her right to be included in that group of Shasta members entitled to further restitution paid in the future by either Murray or Abernethy pursuant to those two consent orders would entitle Petitioner to receive her fair share of those payments.

But Petitioner has an even greater and more significant economic "interest" than merely being admitted to the group of members of Shasta deemed entitled to restitution from Murray and Abernethy. Because Petitioner was denied her right to receive her rightful proportionate share of the funds held by the Receiver for the benefit of Shasta's members during final distribution by the Receiver in December, 2007 the Appellate Court is certainly now in a position (on favorable review of the merits of her claim) to fashion a remedy for Petitioner that places her *first in line* to receive the full amount of any restitution due members of Shasta from either Murray or Abernethy until such time as she has received a percentage of her claim that equals the same percentage of her total claim that has been received to date by every other member of Shasta who participated in both the Receiver's interim and final distribution payments.

Moreover, the remedy available to Petitioner upon favorable review of her claim by the Appellate Court is not limited to passively waiting for future payments to be generated at the initiative of either Murray or Abernethy. The consent orders issued by the District Court specifically confer upon all Shasta members (whose claims were allowed) the third party beneficiary status stated in Rule 71 of the Federal Rules of Civil Procedure (see App. 38a with respect to Murray and App. 56a with respect to Abernethy). Should Petitioner discover a source of income to either Murray or Abernethy the third party beneficiary status of Fed. Rule Civ. P. 71 confers upon her the right to take such initiative as might be necessary and prudent to enforce the District Court's consent order for her benefit in either federal or state court.

All of these remedies are not theoretical, hypothetical or imaginary. To hold otherwise is to conclude that consent orders issued by a District Court are merely an exercise in judicial futility with no practical value whatsoever to those for whom the consent orders were ostensibly issued. Moreover it should be noted that by its terms the District Court Consent Order with respect to Murray (App. 38a) and the Consent Order with respect to Abernethy (App. 55a) both require that restitution payments from either defendant *take precedence over the amount of any additional fine or penalty imposed upon them by those Consent Orders.*

## II. THE THIRD CIRCUIT COURT OF APPEALS WAS WITHOUT POWER OR AUTHORITY TO REFUSE TO EXERCISE APPELLATE JURISDICTION.

Equally important as the *right* to seek and obtain appellate review once that right is conferred by either the Constitution or by act of Congress is the consistently recognized principle enunciated by Chief Justice John Marshall in 1821 that federal courts are without the inherent power or authority to disavow or refuse to exercise the jurisdiction they possess:

> "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. ...We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L. Ed. 257, 291 (1821).

See also *William R. Willcox v. Consolidated Gas Company of New York,* 212 U.S. 19, 40 (1909) where this Court cited favorably to *Cohens* and stated clearly: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."

In *Hyde v. Stone*, 61 U.S. 170, 175 (1857) this Court through Mr. Justice Campbell correctly observed: "But the courts of the United States are

bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends". And that particular statement was cited with approval thirty six years later by Justice Jackson in *Chicot County Ark. v. Sherwood,* 148 U.S. 529, 534 (1893) when the issue was once again whether federal jurisdiction could be defeated either by concurrent state court jurisdiction or state legislation. See also *John C. McClellan v. John E. Carland,* 217 U.S. 268, 281 (1910) citing to *Chicot County Ark.* with approval for the proposition that the Circuit Court of Appeals *could not* abandon "...its jurisdiction over a case of which it had cognizance. ...This it has been steadily held, a Federal court may not do." See also *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415 (1964) where this Court stated unequivocally "(w)hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *." [4]

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[4] The three categories that permit abstention discussed in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813-816 (1976) clearly do not apply to the present appeal of Petitioner and there are no considerations in the present matter that require regard for federal-state relations. It is true this Court has, on occasion, permitted a particular federal district court to relinquish its jurisdiction under the principle of forum non conveniens [see *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501 (1947)] but the venue considerations discussed at length by the Court in that particular case now sanctioned in 28 U.S.C. § 1404(a) certainly do not apply to the Third Circuit Court's appellate jurisdiction conferred by 28 U.S.C. § 1291.

## III. THIS COURT HAS A LONG TRADITION OF GRANTING CERTIORARI TO PROTECT THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

When questions are presented to this Court about the due process sufficiency of appellate review afforded in state courts this Court has noted that "...the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994).

*Honda Motor Co., Ltd.* concluded at that same page 430 that "(w)hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *In re Winship*, 397 U.S., at 361, 90 S.Ct., at 1071." The "absent procedure" in the present matter is *appellate review* of the two final District Court orders that are the subject of Petitioners appeal. Those District Court orders offered absolutely no reason or basis for denying Petitioner's claim as a member of the entity Shasta.

This Court has also held in *Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956) that when that state refused to provide to those unable to pay the fee for a stenographic transcript of the trial

proceedings (considered necessary to properly prepare a required bill of exceptions) such a policy on the part of that state violated due process. If the imposition of such a barrier to appellate review clearly otherwise available to those able to pay for a transcript fails the requirements of due process how much more violative of that principal is the Third Circuit Court's *complete denial* of appellate review on the merits in the present matter?

While it is true that concerns about due process arise more often in the context of deliberations that concern alleged criminal behavior, clearly the principle also applies in the civil context as well. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 168 (1951) *(Frankfurter, J., concurring).*

As former Chief Justice Burger stated: "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the present matter the "procedural protection" petitioner requires is a review on the merits by the Third Circuit Court of the two New Jersey District Court orders that denied her claim.

This fundamental "right to be heard" so basic to the concept of due process itself is the opportunity to be heard "...at a meaningful time and in a

meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See also *United States v. Torres*, 383 F.3d 92, 103 & 104 (3d Cir. 2004) endorsing this basic principle by citing to *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A failure to grant this petition for certiorari would effectively deny Petitioner for all time meaningful Third Circuit Court appellate review of the merits of her rightful claim to be included in that class of persons now entitled to the continuing benefit of the two Consent Orders issued by the District Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert W. Shimer
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645

October 1, 2008

IN THE

# Supreme Court of the United States

ALISON E. SHIMER,
*Petitioner,*

COMMODITY FUTURES TRADING COMMISSION
*Respondent*

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## APPENDIX

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Robert W. Shimer
*Counsel of record*
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645
Date: October 1, 2008

(Date Entered: 1/10/2008)

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

No. 7-4789

Comm Futures Trading

vs.

Equity Finance Group

Alison E. Shimer,

Appellant

BRIEFING AND SCHEDULING ORDER

It is **ORDERED** that the brief for the appellant and the Appendix shall be filed and served on or before 2/19/08;

It is **FURTHER ORDERED** that the brief(s) for appellee(s) shall be filed and served within thirty (30) days of service of appellant's brief;

It is **FURTHER ORDERED** that a reply brief, if any, shall be filed and served within fourteen (14) days of service of appellee's brief;

It is **FURTHER ORDERED** that in the event of default by the appellant in filing the brief and appendix, at the time directed, the appeal may be dismissed forthwith without further notice;

It is **FURTHER ORDERED** that if the appellee fails to file a brief within the time directed by this order, the matter will be listed on appellant's brief only and the appellee may be subject to such sanctions as the court deems appropriate.

**Appellee's attention is called to 3rd Cir. LAR 31.2 which provides**: A local, state or federal entity or agency, which was served in the district court and which is the appellee, must file a brief in

all cases in which a briefing schedule is issued unless the court has granted a motion seeking permission to be excused from filing a brief. The rule does not apply to entities or agencies that are respondents to a petition for review unless the entity or agency is the sole respondent or to entities or agencies which acted solely as an adjudicatory tribunal.

For the Court,

/s/ Marcia M. Waldron
MARCIA M. WALDRON
Clerk

Date: 1/10/2008

(Date Entered: May 20, 2008)

**ALD-198** **May 15, 2008**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**
C.A. No. 07-4789

COMMODITY FUTURES TRADING COMMISSION

VS.

EQUITY FINANCE GROUP LLC, ET AL.

Alison E. Shimer, Appellant

(D. N.J. Civ. No. 04-cv-01512)

Present: SLOVITER, FISHER and HARDIMAN,
CIRCUIT JUDGES

Submitted are:
(1) Motion of appellee Stephen T. Bobo, equity, to dismiss appeal;
(2) Appellant's response in opposition thereto;
(3) Appellee Stephen T. Bobo's reply to appellant's response; and
(4) Motion of appellee Commodity Futures Trading Commission to dismiss appeal

In the above captioned case.

Respectfully,

Clerk

MMW/EGL/awi

Commodity Futures Trading Commission
vs.
Equity Finance Group LLC, et al
C.A. No. 07-4789

ORDER

The foregoing motions to dismiss this appeal are granted. "[I]f an event occurs ... that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." Church of Scientology v. United States, 506 U.S. 9, 12 (1992) (citation omitted). See also Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211,216 (3d Cir. 2003) ("The court's ability to grant effective relief lies at the heart of the mootness doctrine .... If a case has become moot after the district court's entry of judgment, an appellate court no longer has jurisdiction to entertain the appeal."). In this case, the District Court denied appellant's claim in a receivership proceeding. All parties agree that the final distribution of receivership funds already has occurred without payment on appellant's denied claim. If we were to conclude that the District Court erred in denying appellant's claim, the only effective relief that we could grant would be to direct the District Court to allow appellant's claim, recall the distribution from all other investors, and order a re-distribution that would include payment to appellant. Assuming without deciding that it would be possible for us to grant that relief, appellant has expressly disclaimed it, and has made clear that she

seeks merely a legal ruling that the District Court erred in denying her claim. Thus, appellant in effect seeks an advisory opinion, which we lack authority to issue. See Church of Scientology, 506 U.S. at 12; Donovan, 336 F.3d at 216; In re Cantwell, 639 F.2d 1050, 1054 (3d Cir. 1981). We reject appellant's argument that a ruling in her favor would be of practical consequence to her by allowing her to consider bringing a hypothetical and unidentified claim against the Receiver, whose conduct is not at issue in this appeal. See In re Cantwell, 639 F.3d at 1054. Accordingly, the motions to dismiss are granted, and this appeal is hereby dismissed.

By the Court,

/s/ D. Michael Fisher
Circuit Judge

Dated: 20 May 2008
Date Entered: May 20, 2008

(Date Entered: July 8, 2008)

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 07-4789

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COMMODITY FUTURES TRADING COMMISSION

v.

EQUITY FINANCE GROUP LLC; TECH TRADERS, INC.; VINCENT J. FIRTH; ROBERT W. SHIMER; J. VERNON ABERNETHY; COYT E. MURRAY; MAGNUM CAPITAL INVESTMENTS, LTD.; MAGNUM INVESTMENTS, LTD.; TECH TRADERS, LTD.

Alison E. Shimer,
Appellant
(Pursuant to FRAP 12(a))

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On Appeal from the United States District Court
For the District of New Jersey
(D.C. No. 04-cv-01512)
District Judge: Honorable Robert B. Kugler

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Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, *Circuit Judges*

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SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

*/s/ D. Michael Fisher*

BY THE COURT
Circuit Judge

Circuit Judge

Dated: July 8, 2008

(District Court Entry No 580)
Entered: 12/4/2007

**UNITED STATES DISTRICT COURT**
**FOR THE**
**DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING COMMISSION
Plaintiff,
vs. Civil Action No. 04CV 1512

EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., MAGNUM INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY
Defendants
Honorable Robert B. Kugler

**ORDER GRANTING EQUITY RECEIVER'S MOTION FOR AUTHORITY TO MAKE FINAL DISTRIBUTIONS**

This motion having been brought before the Court by Stephen T. Bobo, the Equity Receiver ("Receiver"), and the Court having considered the motion and papers filed in support of it, and for good cause shown,

**IT IS ORDERED THAT:**

1. The Equity Receiver's Motion for Authority to Make Final Distribution is granted.

2. The Receiver is authorized and directed to make a final distribution of receivership funds to Tier 1 investors with Tech Traders consistent with the Final Distribution Schedule attached hereto as Exhibit 1.

3. The Receiver is authorized and directed to make a final distribution of receivership funds to Tier 2 investors with Shasta Capital Associates LLC consistent with the Final Distribution Schedule attached hereto as Exhibit 2.

4. The sum of $103,950 shall be held in reserve in the Shasta reserve account for the disputed claim of Alison Shimer consistent with the Final Distribution Schedule of Disallowed or Disputed Claims attached hereto as Exhibit 3.

5. The Receiver is authorized and directed to make a final distribution of receivership funds to Tier 3 investors with Universe Capital Appreciation, LLC consistent with the Final Distribution Schedule attached hereto as Exhibit 4.

6. The Receiver is authorized and directed to make a final distribution of receivership funds to Tier 2 investors with the Sterling Entities consistent with the Final Distribution Schedule attached hereto as Exhibit 5.

DATED: 12/3/2007 BY THE COURT
Entered: 12/4/2007

/s/ Robert B. Kugler
DISTRICT COURT JUDGE

District Court Entry No 580, Exhibit 3, page 1

Final Distribution Schedule: Shasta Capital Associates, LLC Disallowed or Disputed Claims

*CFTC v. Equity Financial Group, LLC et al.*, Case No. 04CV 1512

| Claim Number | Claimant | Claimed Funds Invested | Claimed Aggregate Funds Invested | 69.3% of Claimed Aggregate Funds Invested | Total Previous Withdrawals | Reserve Amount for Shasta Tier 2 Investor (69.3% of Claimed Aggregate Funds Invested Less Total |
|---|---|---|---|---|---|---|
| 16 | Citco Global Custody N.V. (Stable Absolute Return) DISALLOWED | $250,000.00 | $250,000.00 | $173,250.00 | $0.00 | $0.00 |
| 65 | Shasta, Peter Mt: DISALLOWED | $200,100.00 | $200,100.00 | $138,669.30 | $200,000.00 | $0.00 |
| 67 | Shimer, Alison E.: DISPUTED | $150,000.00 | $150,000.00 | $103,950.00 | $0.00 | $103,950.00 |
| TOTALS | | $600,100.00 | $600,100.00 | $415,869.30 | $200,000.00 | $103,950.00 |

District court Entry No 581
Entered: 12/04/2007

**UNITED STATES DISTRICT COURT**
**FOR THE**
**DISTRICT OF NEW JERSEY**

COMMODITY FUTURES
TRADING COMMISSION
Plaintiff,

vs. Civil Action No. 04CV 1512
Honorable Robert B. Kugler

EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., MAGNUM INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY
Defendants

ORDER

This Motion of Stephen T. Bobo, Equity Receiver, for Determination of Pending Objection having been brought before the Court, the Court having considered the motion and papers filed in support of it, and for good cause shown,

IT IS ORDERED THAT:

1. The Motion of Stephen T. Bobo, Equity Receiver, for Determination of Pending Objection is granted.
2. The disputed claim of Alison Shimer is disallowed in its entirety.

So Ordered.

BY THE COURT
s/ Robert B. Kugler
United States District Judge

December 3, 2007

(District Court Entry No 584)
Entered: 12/04/2007

**UNITED STATES DISTRICT COURT**
**FOR THE**
**DISTRICT OF NEW JERSEY**

COMMODITY FUTURES TRADING COMMISSION
Plaintiff,

vs.

EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., MAGNUM INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY
Defendants

Civil Action No. 04CV 1512
Honorable Robert B. Kugler

**ORDER**

Upon appropriate notice, this case came to be heard upon the Motion of Stephen T. Bobo, Equity Receiver for Approval of his Final Report, Termination of Receivership, Discharge From Further Responsibilities, and Related Relief. Upon review of the motion and the Receiver's Final Report, and consideration of the statements of counsel, it is hereby ORDERED:

1. The Receiver's motion is granted.
2. The Receiver's Final Report is approved in all respects.
3. The Receivership as to Defendants Equity Financial Group, LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments,

Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth and Robert W. Shimer ("the Receivership Defendants") is terminated effective as of the close of business on December 31, 2007 and subject to the provisions set forth below.

4. Upon disbursing the remaining funds of Tech Traders, Inc. and Shasta Capital Associates, LLC in accordance with orders of this Court, and upon performing the duties set forth herein, the Receiver is discharged from all further duties and responsibilities on behalf of the Receivership Defendants.
5. The Receiver will continue to maintain an escrow account containing the funds reserved for the claim filed by Alison Shimer to be disbursed as directed by further order of Court.
5. The Receiver is authorized: (i) 60 days after mailing out the final distribution checks, to provide a notice to holders of uncashed checks that payment will be stopped on such checks in 25 days from the date of the notice; (ii) to thereafter stop payment on all distribution checks still outstanding following the expiration of the 25 day notice period; and (iii) to thereafter transfer any funds relating to checks on which payment has been stopped (net of stop payment charges) as follows: in the case of uncashed distributions to Tech Traders, Shasta, Universe, or Sterling investors, the funds shall be redistributed

to all other investors entitled to share in that respective final distribution pro-rata based on the approved final distribution schedule, and in the case of uncashed distributions to non-investor creditors of Tech Traders, the funds shall be redistributed to all other non-investor creditors of Tech Traders pro-rated based on the approved distribution schedule.

6. To the extent necessary, the Receiver is authorized after December 31, 2007 to execute and file final federal and state tax returns on behalf of Tech Traders, Inc., Shasta Capital Associates, LLC ("Shasta"), Magnum Investments Ltd. and Magnum Capital Investments, Ltd.
7. The Receiver is authorized to dispose of business records for Tech Traders Inc., Equity Financial Group, LLC ("Equity") and Shasta after January 1, 2009 that are unnecessary to further maintain in his judgment and consistent with any applicable record-keeping requirements. The Receiver is authorized, to the extent practicable, to return any unnecessary Equity or Shasta records to Robert Shimer or Vincent Firth, and Tech Traders or Magnum records to Coyt E. Murray, if the Receiver receives such a request in writing from any of them by December 31, 2008 and at the expense of the requesting party.

8. The Receiver is authorized to return Firth or Shimer personal records to Firth or Shimer, respectively, if they so request in writing by December 31, 2008 and at their expense.

BY THE COURT

/s/ Robert B. Kugler

DATED: 12/04/07
Entered: 12/04/2007

*Prepared By*:
Stephen T. Bobo (#6182054)
Reed Smith LLP
10 South Wacker Drive, Suite 4000
Chicago, IL 60606
(312) 207-1000

(District Court Docket Entry 585)
Entered 12/06/2007

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

COMMODITY FUTURES TRADING COMMISSION
Plaintiff,

Civil No. 04-1512 (RBK)

v.

**ORDER**

EQUITY FINANCIAL GROUP, LLC, et al.,
Defendants

THIS MATTER having been brought before the Court on its own motion; and

THE COURT NOTING that the disputed claim of Alison Shimer has been disallowed in its entirety by an order of December 3, 2007 (Docket Entry No. 581); and

THE COURT NOTING that Receiver has been authorized and directed to make a final distribution of receivership funds by an order of December 3, 2007 (Docket Entry No. 580); and

THE COURT ORDERS the Receiver to no longer hold the sum of $103,950 for the disputed claim of Alison Shimer in reserve, as that claim has been disallowed in its entirety; and

THE COURT ORDERS the Receiver to place these funds with the other receivership funds for use in the final distribution.

THIS ORDER amends the Court's order of December 3, 2007 granting the Receiver's motion for the authority to make a final distribution (Docket Entry No. 580).

Date: 12-5-2007 /s/ Robert B. Kugler
Entered: 12/6/2007

ROBERT B. KUGLER
U.S. DISTRICT JUDGE

Elizabeth M. Streit-Lead Trial Attorney (ES-2235)
Scott R. Williamson, Deputy Regional Counsel (SW-9752)
Rosemary Hollinger, Regional Counsel (RH-6870)
Commodity Futures Trading Commission
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Paul Blaine (PB-5422)
Assistant United States Attorney
For the District of New Jersey
Camden Federal Building & US Courthouse
401 Market Street, 4th Floor
Camden, NJ 08101
856-757-5412 (Entered: 7/02/2007)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

| | |
|---|---|
| Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray and J. Vernon Abernethy, Defendants | Civil Action No: 04 CV 1512<br>Hon. Robert B. Kugler<br>U.S. District Judge<br><br>Hon. Ann Marie Donio<br>Magistrate Judge<br><br>**Consent Order of Permanent Injunction and Other Ancillary Relief Against Defendants Tech Traders, Ltd, Magnum Capital Investments, LTD. and Coyt E. Murray** |

On April 1,2004, Plaintiff, Commodity Futures Trading Commission ("CFTC" or "Commission"), filed a Complaint against Defendants Equity Financial Group, LLC ("Equity"), Tech Traders, Inc., Vincent J. Firth ("Firth") and Robert W. Shimer ("Shimer") seeking injunctive and other equitable relief for violations of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C §§ 1 et seq. (2002), and the Commission Regulations promulgated thereunder, 17 C.F.R. §§ 1 et seq. (2006). On August 12, 2004, upon leave of Court, the Commission filed a First Amended Complaint against the previously named defendants and, additionally, against Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Coyt E. Murray ("Murray") and J. Vernon Abernethy ("Abernethy"). On August 24, 2004, the Court entered a Consent Order of Preliminary Injunction and Other Ancillary Relief against Tech Traders, Inc., Tech Traders, Ltd., (hereinafter referred to collectively as "Tech Traders"); Magnum Investments, Ltd., Magnum Capital Investments, Ltd., (hereinafter referred to collectively as "Magnum"); and Murray.

## I. CONSENT AND AGREEMENT

1. To effect settlement of the matters alleged in the First Amended Complaint against Tech Traders, Magnum and Murray (hereinafter referred to collectively as "Defendants"), without a trial on the merits or any further judicial proceedings, Defendants consent to the entry of this Order. Defendants admit the findings of fact and

conclusions of law stated in this Order. Defendants consent to the use by the CFTC of the findings herein in this proceeding and in any other proceeding brought by the CFTC or to which the CFTC is a party. Defendants do not consent to the use of this Order, or the findings of fact or conclusions of law; as the sole basis for any other proceeding brought by the CFTC; except that they consent to any use in any proceeding to enforce or to effectuate the terms of this Order, including use by the Commission, in any bankruptcy proceeding brought by or against them. Solely with respect to any such bankruptcy proceeding or any proceeding to enforce this Order, Defendants agree that the allegations of the First Amended Complaint and the findings in this Order shall be taken as true and correct and be given preclusive effect, without further proof.

2. Defendants affirm that they have agreed to this Order voluntarily, and that no promise or threat has been made by the CFTC or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Order, other than as set forth specifically herein.

3.Defendants acknowledge service of the Summons and the First Amended Complaint.

4.Defendants admit the jurisdiction of this Court over them, admit that the Court has subject matter jurisdiction over this action, and admit that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

5. Defendants waive:

(a) all claims which they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504

(2000), and 28 U.S.C. § 2412 (2000), relating to, or arising from, this action;

(b) any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief; and

(c) all rights of appeal from this Order.

6. No provision of this Order shall in any way limit or impair the ability of any person to seek any legal or equitable remedy against Defendants or any other person in any other proceeding, including any current or subsequent bankruptcy.

7. Defendants agree that neither they nor any of their agents or employees acting under their authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the First Amended Complaint or findings or conclusions in this Order, or creating, or tending to create, the impression that the First Amended Complaint or this Order is without a factual basis; provided, however, that nothing in this provision shall affect Defendants': i) testimonial obligations; or ii) rights to take legal positions in other proceedings to which the CFTC is not a party. Defendants shall take all necessary steps to ensure that all of their agents and employees understand and comply with this agreement.

8. Defendants agree to cooperate with staff of the Commission in the continuing litigation of this matter. As part of such cooperation, Defendants agree, subject to all applicable privileges, to comply fully, promptly, and truthfully to any inquiries or requests for information or testimony, including but not limited to: (1) authenticating documents; (2)

responding to requests for production of documents concerning this matter within Defendants' possession, custody, or control, and permitting Commission staff to inspect and copy such documents; and (3) testifying completely and truthfully in this action and producing statements to the Commission, interviews, depositions, or testimony, and to provide testimony (including witness preparation) related to any trial concerning the subject matter of this proceeding.

9. Defendants consent to the continued jurisdiction of this Court for the purpose of enforcing the terms and conditions of this Order and for any other purposes relevant to this case.

## II. FINDINGS

The Court makes the following findings of fact:

1.This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

2. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-l(e), because Defendants are found in, inhabit, or transact business, among other places, in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur, among other places, within this district.

3. The Tech Traders and Magnum Defendants consist of two domestic and two foreign companies, identified below, which were controlled by Murray, shared offices and employees, and commingled funds received from investors. In substance, there is no

meaningful distinction among the entities, which operated as a common enterprise.

a. Defendant Tech Traders, Inc. is a Delaware corporation located in Gastonia, North Carolina.

b. Defendant Tech Traders, Ltd. is a foreign corporation organized under the laws of the Bahamas. It is a sister company to Tech Traders, Inc. and was party to a "Service Agreement" dated June 1, 2001, which provided that Tech Traders, Ltd. would place investment funds with Tech Traders, Inc. for trading.

c. Defendant Magnum Investments, Ltd. was incorporated as a South Carolina corporation in 1991 and dissolved by the State in 1993. However, Magnum Investments, Ltd.'s operations continued throughout the relevant time of this action. Magnum Investments, Ltd. was party to a "Service Agreement" dated June 1, 2001 that provided that Magnum Investments, Ltd would place investment funds with Tech Traders, Inc. for trading.

d. Defendant Magnum Capital Investments, Ltd. is a foreign corporation organized under the laws of the Bahamas. It is a sister company to Magnum Investments, Ltd. and was party to a "Service Agreement" dated June 1, 1999, which provided that Magnum Capital Investments, Ltd. would send investment funds for placement with Magnum Investments, Ltd. for trading.

e. Defendant Coyt E. Murray resides in Tega Cay, South Carolina and is President and

Chief Executive Officer of Tech Traders, Inc., Chief Executive Officer Tech Traders, Ltd., President of Magnum Capital Investments Ltd. and was a registered agent of Magnum Investments, Ltd.

4. From 1998 until April 1, 2004 (the "relevant time period"), Tech Traders and its predecessor, Magnum, pooled proprietary and pool participant funds and used some of them to trade exchange-traded commodity futures contracts and foreign currency contracts in accounts they carried at futures commission merchants ("FCMs") in their own names. They deposited funds of participants into bank accounts carried in their own names, and paid salaries, expenses and other disbursements out of those accounts. Murray knew that the funds in these accounts were not to be used in such a manner.

5. Murray was the controlling person of Tech Traders and Magnum. Murray was Tech Traders' and Magnum's primary contact person in dealing with potential and actual participants and clients in the Tech Traders and Magnum commodity pools. He was Tech Trader's and Magnum's primary decision-maker. Murray represented to Firth, Shimer and others that Tech Traders and Magnum used a "portfolio" system for successful trading of selected exchange-traded financial futures contracts, including the NASDAQ 100 and S&P 500, and falsely claimed that the system earned high returns. Murray represented that the success of the portfolio system derived from the fact that it utilized many different, allegedly non-correlated, separate systems traded concurrently on different time frames using proprietary algorithms, which not only helped filter

out market noise for the purpose of more correctly determining the real direction of market trends, but also would balance and smooth the performance of the system.

6. Tech Traders, Magnum and Murray solicited and accepted more than $47 million from Equity, Firth, Shimer, the Sterling Group of Companies and other pool participants to trade commodity futures contracts. Tech Traders and Magnum pooled these funds, which included more than $14 minion from Shasta and its foreign counterpart New Century Trading, LLC, more than $15.9 million from the Sterling Group of Companies, and more than $17.5 million from other investors. Tech Traders and Magnum ultimately deposited only $30,481,910 in commodity futures and foreign currency trading accounts they maintained in their own names. Further, throughout the relevant time period, Tech Traders and Magnum lost $10,523,170 trading commodity futures contracts and other financial instruments in the accounts that held Shasta, Sterling Group of Companies and other participant funds. Tech Traders, Magnum and Murray knew that the commodity futures accounts traded by Tech Traders and Magnum, or their designee, were losing money, but did not disclose that information to actual or potential participants.

7. Murray and Tech Traders refused to permit any third persons to see any proprietary information about Tech Traders and the trading systems it used. Instead, they agreed to engage an allegedly independent CPA to review and verify Tech Traders' trading results and supply a monthly trading performance rate of return figure to third parties.

8. In the summer of 2001, Murray and Tech Traders engaged Abernethy to review and verify Tech Traders' trading results and prepare monthly and quarterly reports of trading performance rate of return based upon agreed upon procedures. In addition, for an additional fee, Abernethy periodically verified the total balance of funds held by Tech Traders. Murray and Tech Traders provided these reports to actual and potential participants in Tech Traders' commodity pool, including Shasta. Murray and Tech Traders knew that these actual and potential participants would rely upon not only the performance information provided, but also upon the representation that the performance information was reviewed and verified by an independent CPA.

9. Abernethy produced a combination of monthly and quarterly reports covering Tech Traders' trading performance from at least June 2001 through February 2004. These reports were based upon information provided to him by Murray and Tech Traders, which included a rate of return number. Each month, the rate of return Murray and Tech Traders generated and supplied to Abernethy included new deposits received by Tech Traders as a gain in value in the Tech Traders pool. Consequently, the Tech Traders' rates of return reported by Abernethy were false.

10. Without exception, Murray and Tech Traders supplied Abernethy with selective and materially incomplete source documents with which to verify the rate of return number Murray and Tech Traders had previously provided to Abernethy and which Abernethy included in the monthly and quarterly reports he prepared.

11. The information Tech Traders and Murray provided to Abernethy upon which Abernethy based his reports showed gains for every month or quarter for which Abernethy reported from June 2001 through February 2004. Abernethy reported double-digit gains for at least 23 of the 33 months during this period. The worst performance reported was a purported gain of 4.11% for the month of June 2001, and the next worst performance reported was a purported gain of 9.02% for the month of January 2004.

12. In deciding to participate or continue to participate in the commodity pool, all of the Tech Traders commodity pool participants relied upon the trading performance rate of return number that Tech Traders and Murray provided to Abernethy, which he included in the monthly and quarterly reports.

13. In addition to preparing the reports, Abernethy directly or indirectly solicited potential participants for Tech Traders. Tech Traders and Murray knew that Abernethy was soliciting potential participants for Tech Traders.

14. Tech Traders and Magnum acted as commodity pool operators ("CPOs") in that, through Murray, they operated businesses that are of the nature of investment trusts, syndicates, or similar forms of enterprise and solicited, accepted or received from others, funds for the purpose of trading in commodity futures contracts subject to the rules of a contract market or derivatives transaction execution facility. Tech Traders, Magnum and Murray utilized means of interstate commerce, such as the U.S. mails and interstate telephone lines, to manage the Tech

Traders and Magnum commodity pools, but have never been registered with the Commission in any capacity, nor have they filed an exemption from registration.

15. Tech Traders and Magnum acted as commodity trading advisors ("CTAs") by making trading decisions for compensation or profit for their commodity pools and exercising power of attorney over at least one third-party commodity futures trading account. They utilized means of interstate commerce, such as the U.S. mails and interstate telephone lines, while acting as CTAs, but have never been registered with the Commission in any capacity, nor have they filed an exemption from registration.

16. Murray acted as an associated person of Tech Traders and Magnum by directly or indirectly soliciting funds for participation in the Tech Traders and Magnum commodity pools and by exercising power of attorney to trade commodity futures in third party trading accounts.

17. Murray also acted as a controlling person for Tech Traders and Magnum by, among other things, handling all the day-to-day decisions for these common enterprise firms, holding himself out as the firms' primary trader, handling most of the communications between Tech Traders, Magnum and participants, and preparing work papers for use by Abernethy.

18. Commencing in March 2003, Tech Traders also exercised trading authority, for compensation, over at least one commodity futures trading account owned by one of the Sterling Group of Companies. Tech Traders lost money trading that account.

19. Tech Traders did not disclose to the participants that at least one of its trading accounts was traded by a third-party CTA, or that the third-party CTA lost money trading that account.

20. Murray, Magnum and Tech Traders knew that the funds Tech Traders received from Shasta, the Sterling Group of Companies and certain other direct participants were comprised of funds invested by third-party participants.

21. Tech Traders and Magnum received management fees and distributions to which they were not entitled, in that Tech Traders and Magnum were only to receive a share of trading profits remaining after payment of certain monthly preferential returns on investment to participants, and Tech Traders and Magnum never generated net trading profits.

22. Ultimately, Tech Traders and Magnum lost, misappropriated and dissipated $16,401,151.

## III. CONCLUSIONS OF LAW

1. From at least 1998 to the present, Tech Traders, Magnum and Murray have cheated or defrauded or attempted to cheat or defraud and willfully deceived or attempted to deceive pool participants or prospective pool participants and clients and potential clients by misrepresenting the performance of the trading system used by Tech Traders, Magnum and the commodity pools they operated, distributing false statements showing profits when there were none, failing to disclose that the Magnum and Tech Traders commodity pools

consistently lost money and by making other misrepresentations and omissions of material facts, in violation of Section 4b(a)(2)(i)-(iii) of the Act.

2. During the same time period, Tech Traders and Magnum acted as CPOs in that they engaged in businesses that are of the nature of investment trusts, syndicates, or similar forms of enterprise and in connection therewith, solicited, accepted or received funds, securities or property from others for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility.

3. During the same time period, Tech Traders and Magnum acted as CTAs in that for compensation or profit they engaged in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of any contract market; any commodity option; or any leverage transaction; or for compensation or profit, and as a part of a regular business, issued or promulgated analysis or reports concerning any of the activities referred to above.

4. From at least 1998 through April 1, 2004, Tech Traders, Magnum and Murray violated Section 4*o*(1) of the Act, 7 U.S.C. § 6*o*(1), in that they directly or indirectly employed a device, scheme, or artifice to defraud commodity pool participants, and engaged in transactions, practices or a course of business which operated as a fraud or deceit upon commodity pool participants.

5. Tech Traders and Magnum acted as CPOs and as CTAs and used the mails and other means or

instrumentalities of interstate commerce; directly or indirectly, to engage in business as CPOs and as CTAs without the benefit of registration, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1)(2002).

6. During the relevant time period, Murray was associated with Tech Traders and Magnum, as a partner, officer, employee, consultant, or agent (or in a similar status), in a capacity that involved the solicitation of funds, securities or property for participation in a commodity pool without the benefit of registration, in violation of Section 4k(2) of the Act, 7 U.S.C. § 6k(2) (2002).

7. Tech Traders and Magnum commingled property of their commodity pools with their own property or the property of others, in violation of Commission Regulation 4.20(c), 17 C.F.R. § 4.20(c)

8. Tech Traders and Magnum failed to deliver to prospective participants in pools that they operated Disclosure Documents for the pools prepared in accordance with Commission Regulations 4.24 and 4.25, 17 C.F.R. §§ 4.24 and 4.25 (2006). Therefore, Tech Traders and Magnum violated Commission Regulation 4.21, I7 C.F.R. § 4.21 (2006).

9. Tech Traders and Magnum failed to distribute to participants in pools that they operated Account Statements for their pools prepared in accordance with Commission Regulation 4.22, 17 CF.R. § 4.22 (2006). Therefore, Tech Traders and Magnum violated Commission Regulation 4.22, 17 C.F.R. § 4.22 (2006).

10. As CTA for the Shasta pool and others, Tech Traders and Magnum violated Commission Regulation 4.30, 17 C.F.R. § 4.30 (2006), by accepting

their funds and trading them in its accounts at FCMs under their own names.

## IV ORDER FOR PERMANENT INJUNCTION

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:**

1. Defendants and all persons insofar as they are acting in the capacity of their agents, servants, employees and attorneys, and all persons insofar as they are acting in concert or participation with the Defendants, are permanently restrained, enjoined and prohibited from directly or indirectly:

A. Cheating or defrauding or attempting to cheat or defraud; or willfully making or causing to be made to other persons any false report or statement, or willfully deceiving or attempting to deceive other persons by any means whatsoever in or in connection with any order to make, or the making of any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person, in violation of Section 4b(a)(2)(i) - (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i)-(iii), including but not limited to the activities described in paragraphs II.3 through II.22 above;

B. Acting in the capacity of a commodity trading advisor or commodity pool operator, or associated person of a commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, employing any device, scheme or artifice to defraud any client or participant or prospective client or participant or engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant, in violation of Section 4*o*(1) of the Act, 7 U.S.C. § 6*o*(1), including but not limited to the activities described in paragraphs II.3 through II.22 above;

C. Acting in the capacity of a commodity trading advisor or commodity pool operator, using the mails or any means or instrumentality of interstate commerce, in connection with the business of a commodity trading advisor or commodity pool operator, without being registered under the Act in violation of Section 4m of the Act, 7 U.S.C. § 6m;

D. Acting in the capacity of a commodity pool operator, commingling the property of any pool operated or intended to be operated with the property of any other person, failing to deliver to prospective pool participants in a pool that is operated a Disclosure Document prepared in accordance with Commission Regulations 4.24 and 4.25, failing to

distribute to pool participants an Account Statement prepared in accordance with Commission Regulation 4.22, and in the capacity of a commodity trading advisor, accepting from existing or prospective clients funds, securities or other property in the trading advisor's name to purchase, margin, guarantee or secure any commodity interest of the client, in violation of Commission Regulations 4.20(c), 4.21, 4.22 and 4.30, 17 C.F.R. §§ 4.20(c), 4.21, 4.22 and 4.30 (2006); and

E. Associating with a commodity pool operator, as a partner, officer, employee, consultant, or agent (or acting in a similar status or performing similar functions), in a capacity that involves the solicitation of funds, securities or property for participation in a commodity pool or supervising any person so engaged without the benefit of registration in violation of Section 4k(2) of the Act, 7 U.S.C. § 6k(2).

2. Defendants are further permanently enjoined and prohibited from engaging, directly or indirectly, in any activity related to trading any commodity, as that term is defined in Section 1a(4) of the Act, 7 U.S.C. § 1a(4)(2002) ("commodity interest") including but not limited to, the following:

A. Engaging in, controlling, directing or accepting funds for the trading for any

commodity interest in any markets or on any entity regulated by the Commission for or on behalf of any other person or entity, whether by power of attorney or otherwise;

B. Soliciting or accepting any funds from any person in connection with the purchase or sale of any commodity interest in any markets or on any entity regulated by the Commission;

C. Entering into any commodity interest in any markets or on any entity regulated by the Commission for their own account, for any accounts in which they have a direct or indirect interest and/or having any commodity interest traded on their behalf;

D. Introducing customers to any other person engaged in the business of trading in commodity interests in any markets or on any entity regulated by the Commission;

E. Otherwise engaging in any business activities related to commodity interests that require registration; and

F. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9), or acting, directly or indirectly, as a principal, agent, or any other officer, agent or

employee of any person registered, required to be registered, or exempted from registration with the Commission, unless such exemption is pursuant to Section 4. 1 4(a)(9) of the Commission's Regulations, 17 C.F.R. § 4.14(a)(9).

## V. ORDER FOR OTHER EQUITABLE RELIEF

**IT IS FURTHER ORDERED THAT:**

**A. Restitution**

1. Upon entry of this Order, judgment is entered against the Defendants under which: Tech Traders, Inc. and Tech Traders, Ltd. are jointly and severally liable for restitution in the amount of $15,117,523, plus pre-judgment interest of $3,135,002.38 and post-judgment interest (the "Tech Trader restitution obligation"); Magnum Capital Investments Ltd. and Magnum Investments, Ltd. are jointly and severally liable for restitution in the amount of $2,753,489, plus pre-judgment interest of $125,300.96 and post-judgment interest (the "Magnum restitution obligation"); and Murray is jointly and severally liable for the Tech Traders restitution obligation and the Magnum restitution obligation. Post-judgment interest shall accrue commencing on the date this Order is signed and continue as to each Defendant for his or its respective restitution amount until that restitution amount is paid in full. Post-judgment interest shall accrue commencing on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

2. The Defendants' payments of restitution pursuant to this Order shall first be paid to the Receiver, who shall make distribution of such amounts to pool participant claimants whose claims are allowed in the claims process. After the Final Order of Distribution is entered by the Court, restitution payments shall be made on a pro rata basis according to the Final Order of Distribution to pool participant claimants with allowed claims until those amounts (including interest) are fully satisfied, and to any other Tech Traders or Magnum pool participant who provides sufficient evidence to the Court to support a claim for restitution.

3. All payments by the Tech Trader and Magnum defendants pursuant to his order shall first be applied to their respective restitution obligations, and thereafter to their civil monetary obligations described below. All payments by Murray pursuant this Order shall first be applied to his restitution obligation, then to his disgorgement obligation, and thereafter to his civil monetary penalty obligation described below.

4. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each pool participant listed on the Final Order of Distribution is explicitly made an intended third-party beneficiary of this Order and may, after termination of the Receivership, seek to enforce obedience of this Order to obtain satisfaction of any portion of the restitution which has not been paid by the Defendants. Any other Magnum or Tech Traders pool participant who is not listed on the Final Order of Distribution may petition the Court to obtain third party beneficiary status to pursue a claim to restitution from the Defendants.

**B. Disgorgement**

1. Upon entry of this Order, Murray is liable for and a judgment is entered against him for disgorgement of $1,221,615, plus pre-judgment interest of $253,332.91 and post judgment interest. Post judgment interest shall accrue commencing on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. Murray shall pay this disgorgement by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Marie Bateman - AMZ-300
DOT/FAA/MMAC
6500 S. Macarthur Blvd.
Oklahoma City, OK 73169

If payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions. Murray shall accompany payment of disgorgement with a cover letter that identifies himself, and the name and docket number of this proceeding. Murray shall simultaneously transmit a copy of the cover letter and the form of payment to

Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581.

## C. Civil Monetary Penalty

1. Upon entry of this Order, Murray is liable for and a judgment is entered against him for civil monetary penalty of $2,443,230, plus post-judgment interest. Tech Traders, Inc. and Tech Traders, Ltd. are jointly and severally liable for a civil monetary penalty of $7,558,761, plus post judgment interest. Magnum Investments, Ltd. and Magnum Capital Investments, Ltd. are jointly and severally liable for a civil monetary penalty of $1,376,744, plus post-judgment interest. Post- judgment interest shall accrue commencing on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961. The Defendants shall pay their respective civil monetary penalties by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission
Division of Enforcement
ATTN: Marie Bateman - AMZ-300
DOT/FAA/MMAC
6500 S. Macarthur Blvd.
Oklahoma City, OK 73169

If payment by electronic transfer is chosen, contact Marie Bateman at 405-954-6569 for instructions. Defendants shall accompany payment of the penalties with a cover letter that identifies the paying defendant, and the name and docket number

of this proceeding. Defendants shall simultaneously transmit a copy of the cover letter and the form of payment to

Office of Cooperative Enforcement
Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581.

**D. Partial Payments**

1. Any acceptance by the CFTC of partial payment from any of the Defendants of their respective restitution, disgorgement and/or civil monetary obligations shall not be deemed a waiver of the Defendant's obligation to make further payments pursuant to this Order, or a waiver of the CFTC's right to seek to compel payment from the Defendant of any remaining balance.

**E. Collateral Agreements**

1. The Defendants shall immediately notify the CFTC if they make or have previously made any agreement with any customer obligating any of them to make payments outside of this Order. The Defendants shall also provide immediate evidence to the CFTC of any payments made pursuant to such agreement. The Defendants shall also notify the CFTC of any federal or state civil or criminal action related to the same activities that are the subject of this action.

## VI. MISCELLANEOUS PROVISIONS

1. All notices required by this Order shall identify this matter by caption and shall be sent by certified mail, return receipt requested, as follows:

Notice to CFTC:

Director, Division of Enforcement
Commodity Futures Trading Commission
1155 21st St. NW
Washington, DC 20581

Notice to any of the Defendants:

Melvyn J. Falis
Gusrae, Kaplan & Bruno
120 Wall Street
New York, NY 10014

2. In the event that any of the Defendants changes their residential or business telephone number(s) and/or address(es) at any time, they shall provide written notice of the new number(s) and/or address(es) to the CFTC within twenty (20) calendar days thereof.

3. The injunctive provisions of this Order shall be binding on the Defendants, upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of any of the Defendants, and upon any person who receives actual notice of this Order by personal service, facsimile or otherwise insofar as he or she is acting in active concert or participation with any of the Defendants.

4. This Order incorporates all of the terms and conditions of the settlement among the parties hereto. Nothing shall serve to amend or modify this

Order in any respect whatsoever, unless: (I) reduced to writing; (2) signed by all parties hereto; and (3) approved by order of this Court.

5. The failure of any party to this Order to require performance of any provision of this Order shall in no manner affect the right of such party at a later time to enforce the same or any other provision of this Order. No waiver in one or more instances of the breach of any provision contained in this Order shall be construed as a further or continuing waiver of a breach of any other provision of this Order.

6. Defendants warrant that Murray is a corporate representative of Tech Traders and Magnum, that this Order has been duly authorized by Tech Traders and Magnum, and Murray has been duly empowered to sign and submit it on behalf of Tech Traders and Magnum.

7. This Court shall retain jurisdiction of this cause to assure compliance with this Consent Order and for all purposes related to this action, including securing additional funds or property from third parties for satisfaction of the Defendants' obligations for restitution, disgorgement and payment of civil monetary penalties.

IT IS SO ORDERED

Dated: 6/28/2007

/s/ Robert B Kugler
Hon. Robert B. Kugler
United States District Court Judge

Entered: 7/02/2007

CONSENTED TO AND APPROVED BY:

/s/ Coyt E. Murray
Coyt E. Murray, individually and on behalf of Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd.

/s/ Gusrae, Kaplan & Bruno, PLLC

Gusrae, Kaplan & Bruno, PLLC
120 Wall Street
New York, NY 10005
Attorney for Defendants Tech Traders, Inc., Tech Traders, Ltd., Magnum Capital Investments, Ltd., Magnum Investments, Ltd. And Coyt E. Murray

/s/ Elizabeth M. Streit
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Dated: 3/27/07

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856-757-5412

(Entered 7/7/2007)

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE**

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| Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd,, Vincent J. Firth, Robert W. Shimer, Coyt E. Murray and J. Vernon Abernethy, Defendants | Civil Action No: 04 CV 1512<br>Hon. Robert B. Kugler<br>U.S. District Judge<br><br>Hon. Ann Marie Donio<br>Magistrate Judge<br><br>**Consent Order of Permanent Injunction and Other Ancillary Relief Against Defendant J. Vernon Abernethy** |

On April 1, 2004 Plaintiff Commodity Futures Trading Commission ("Commission"), filed a Complaint against Defendants Equity Financial Group, LLC ("Equity"), Tech Traders, Inc., Vincent J. Firth , ("Firth") and Robert W. Shimer ("Shimer") seeking injunctive and other equitable relief for violations of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C §§ 1 et. seq (2002), and the Commission Regulations promulgated thereunder 17 C.F.R. §§ 1 et seq. (2004). Pursuant to Court Order, the Commission filed a First Amended Complaint on August 12, 2004 against the previously named Defendants and, additionally, against Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Coyt E. Murray ("Murray") and J. Vernon Abernethy ("Abernethy"). The Court entered a Consent Order of Preliminary Injunction and Other Ancillary Relief against Abernethy on August 23, 2004.

## I. Consent And Agreement

1. To effect settlement of the matters alleged in the Complaint against Defendant Abernethy without a trial on the merits or any further judicial proceedings, and without admitting or denying the allegations of the First Amended Complaint, or the findings in this Consent Order of Permanent Injunction and Other Equitable Relief ("Order"), Abernethy consents to the entry of this Order. Abernethy consents to the use by the CFTC of the findings herein in this proceeding and in any other proceeding brought by the CFTC or to which the CFTC is a party. Abernethy does not consent to the use of this Order, or the findings of fact or

conclusions of law, as the sole basis for any other proceeding brought by the CFTC; except that he consents to any use in any proceeding to enforce or to effectuate the terms of this Order including use by the Commission or any person identified in this Order under Rule 71 Fed. R. Civ. P. as having rights under this Order, in any bankruptcy proceeding brought by or against him. With respect to bankruptcy proceedings, Abernethy agrees to except the restitution obligations set forth in this Order from discharge. Solely with respect to any such bankruptcy proceeding or any proceeding to enforce this Order, Abernethy agrees that the allegations of the First Amended Complaint and the findings in this Order shall be taken as true and correct and be given preclusive effect, without further proof.

2. Abernethy affirms that he has agreed to this Order voluntarily, and that no promise or threat has been made by the CFTC or any member, officer, agent or representative thereof, or by any other person, to induce consent to this Order, other than as set forth specifically herein.

3. Abernethy acknowledges service of the Summons and the First Amended Complaint.

4. Abernethy admits the jurisdiction of this Court over him, admits that the Court has subject matter jurisdiction over this action, and admits that venue properly lies with this Court pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

5. Abernethy waives:

(a) all claims which he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2000), and 28 U.S.C. § 2412 (2000), relating to, or arising from, this action;

(b) any claim of double jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief; and

(c) all rights of appeal from this Order.

6. No provision of this Order shall in any way limit or impair the ability of any person to seek any legal or equitable remedy against Abernethy or any other person in any other proceeding, including any current or subsequent bankruptcy.

7. Abernethy agrees that neither he nor any of his agents or employees acting under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the First Amended Complaint or findings or conclusions in this Order, or creating, or tending to create, the impression that the First Amended Complaint or this Order is without a factual basis; provided, however, that nothing in this provision shall affect Abernethy's: i) testimonial obligations; or ii) rights to take legal positions in other proceedings to which the CFTC is not a party. Abernethy shall take all necessary steps to ensure that all of his agents and employees understand and comply with this agreement.

8. Abernethy agrees to cooperate with staff of the Commission in the continuing litigation of this matter. As part of such cooperation, Abernethy agrees, subject to all applicable privileges, to comply fully, promptly, and truthfully to any inquiries or requests for information or testimony, including but not limited to: (1) authenticating documents; (2) responding to requests for production of documents concerning this matter within Abernethy's possession, custody, or control, and permitting Commission staff to inspect and copy such documents; (3) testifying completely and truthfully in this action and producing statements to the Commission, interviews, depositions, or testimony, and to provide testimony (including witness preparation) related to any trial the subject matter of this proceeding.

9. Abernethy consents to the continued jurisdiction of this Court for the purpose of enforcing the terms and conditions of this Order and for any other purposes relevant to this case.

## II. Findings

The Court makes the following findings of fact:

1. This Court has jurisdiction over this action pursuant to Section 6c of the Commodity Exchange Act ("Act"), 7 U.S.C. § 13a-1 (2002).

2.Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because Defendant Abernethy is found in, inhabits, or transacts business, among other places, in this district, and the acts and practices in violation of the

Act have occurred, are occurring, or are about to occur, among other places, within this district.

3.Corporations A through D (collectively referred to as "Corporation A") and their principal Individual A operated a so-called "super fund" or master pool of one or more commodity pools. Corporation A and Individual A falsely represented to investors in the "super fund" that Corporation A enjoyed extraordinary success trading in selected financial futures contracts using a confidential, proprietary "portfolio" trading system.

4. Corporation A and Individual A engaged Abernethy as an allegedly independent certified public accountant ("CPA") to provide a monthly and quarterly performance number for the "superfund" based on "reviewed" and "verified" trading results. Abernethy prepared monthly and quarterly reports showing that Corporation A enjoyed trading gains from at least June 2001 through February 2004, knowing that the reports were false and that such reports would be provided to prospective and actual participants whom Abernethy knew or should have known would rely upon not only the information included, but also the fact that it had been reviewed and verified by an independent CPA.

5. All of the participants in the "superfund" did rely upon the monthly and quarterly performance number Abernethy provided in deciding to participate or continue to participate in the "superfund". In reliance on such monthly and

quarterly performance numbers, at least 40 participants have lost at least $5 million.

6. Abernethy undertook a faulty agreed-upon-procedures engagement which was not consistent with professional standards, was not independent, did not review all the trading, did not take any steps to "verify" anything, and reported materially inaccurate performance gains, despite possessing documents that disclosed huge trading losses.

7. Abernethy also solicited at least 10 pool participants for Corporation A and Shasta Capital Associates, L.L.C. ("Shasta"), a commodity pool that invested in the "super fund" without being registered to do so using the performance results from the reports he prepared. Abernethy knew that these same performance results were featured in solicitations by Corporation A, Individual A, and Corporation F, the commodity pool operator that ran Shasta, and Individuals B and C, the control persons of Corporation F. He also knew that these same performance results were false and that they were used to prepare statements sent to pool participants.

## III. CONCLUSIONS OF LAW

1. From at least June 2001 to April 2004, Abernethy employed devices, schemes or artifices to defraud clients or prospective clients, and engaged in transactions, practices or courses of business which operated as a fraud or deceit upon clients or prospective clients, in violation of Section 4o(1) of the Act, 7 U.S.C. §6o(1).

2. During the relevant time period, Abernethy was associated with Corporation A and Corporation E as a partner, officer, employee, consultant, or agent (or in a similar status), in a capacity that involved the solicitation of funds, securities or property for participation in Corporation A and Corporation E, in violation of Section 4k (2) of the Act, 7 U.S.C. §6k(2)(2002).

**IV. ORDER FOR PERMANENT INJUNCTION**
**IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:**

1. Abernethy and all persons insofar as they are acting in the capacity of his agents, servants, employees and attorneys, and all persons insofar as they are acting in concert or participation with him, are permanently restrained, enjoined and prohibited from directly or indirectly:

A. In the capacity of a commodity trading advisor or commodity pool operator, or associated person of a commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, employing any device scheme or artifice to defraud any client or participant or prospective client or participant or engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant, in violation of Section 4o(1) of

the Act, 7 U.S.C. §6*o*(1), including but not limited to the activities described in paragraphs II.3 through II.7 above;

B. Associating with a commodity pool operator, as a partner, officer, employee, consultant, or agent (or acting in a similar status or performing similar functions), in a capacity that involves the solicitation of funds, securities or property for participation in a commodity pool or supervising any person so engaged without the benefit of registration in violation of Section 4k(2) of the Act, 7 U.S.C. §6k(2);

C. Engaging in, controlling, directing or accepting funds for the trading for any commodity futures or options accounts for or on behalf of any other person or entity, whether by power of attorney or otherwise;

D. Entering into any commodity futures or options transactions for his own account, for any accounts in which he has a direct or indirect interest and/or having any commodity futures or options traded on his behalf;

E. Introducing customers to any other person engaged in the business of trading in commodity futures and options;

F. Otherwise engaging in any business activities related to commodity futures and options trading that require registration; and

G. Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Commission's Regulations. 17 C.F.R. §4.14(a)(9), or acting, directly or indirectly, as a principal, agent or any other officer, agent or employee of any person registered, required to be registered, or exempted from registration with the Commission, unless such exemption is pursuant to Section 4.14(a)(9) of the Commission's Regulations, 17 C.F.R. §4.14(a)(9).

2. This Court also orders, and Defendant agrees to, the Defendant's performance of the following undertakings:

A. Not to practice before the Commission as an accountant for a period of ten (10) years following entry of this Order;
B. Not to accept any engagement that involves the review or analysis of commodity pool statements; and
C. Not to accept any engagement that involves the analysis of futures or options statements.

## V. ORDER FOR FURTHER EQUITABLE RELIEF

**IT IS FURTHER ORDERED THAT:**

1. Upon entry of this Order, Abernethy is jointly and severally liable for and a judgment is entered against him in the amount of $5,000,000 as restitution ("Restitution Amount"). Abernethy is jointly and severally liable up to the amount of $5,000,000 with any of the Defendants in this case who are found by settlement or after judgment to be jointly and severally liable to the pool participants whose claims are allowed in the claims process established by the Equity Receiver appointed in this case. No prejudgment interest is ordered. However, post-judgment interest shall accrue commencing on the date this Order is signed and continue until the Restitution Amount is paid in full. Post-judgment interest shall be paid at the post-judgment interest rate set forth in 28 U.S.C. §1961. Abernethy agrees to a finding in the bankruptcy proceeding that this restitution obligation is excepted from discharge. All payments made pursuant to this Order by Abernethy shall first be paid to the Receiver for further distribution to claimants whose claims are allowed in the claims process. After the termination of the Receivership, restitution shall be made on a pro rata basis according to the Final Order of Distribution to claimants with allowed claims until those amounts (including interest) are fully satisfied. All payments after satisfaction of the restitution shall be applied to the civil monetary amount described below.

2. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each pool participant listed on the Final Order of Distribution is explicitly made an intended third-party beneficiary of this Order to obtain satisfaction of any portion of the restitution which has not been paid by Abernethy.

**B. Civil Monetary Penalty**

1. Upon entry of this Order, Abernethy is liable for and a judgment is entered against him for a civil monetary penalty of $300,000, plus post-judgment interest. Post judgment interest shall accrue commencing on the date this Order is signed and continue until the civil monetary penalty is paid in full. Post-judgment interest shall be paid at the post judgment interest rate set forth in 28 U.S.C. § 1961. Abernethy shall pay such civil monetary penalty and interest by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, or her successor, Division of Enforcement, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Abernethy and the name and docket number of the proceeding; Abernethy shall simultaneously transmit a copy of the cover letter and the form of payment to the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, N.W., Washington, D.C. 20581.

2. Any acceptance by the CFTC of partial payment from Abernethy of Abernethy's restitution and/or civil monetary obligations shall not be deemed a waiver of Abernethy's obligation to make further payments pursuant to this Order, or a waiver of the CFTC's right to seek to compel payment from Abernethy of any remaining balance.

3. Abernethy shall immediately notify the CFTC if he makes or has previously made any agreement with any customer obligating him to make payments outside of this Order. He shall also provide immediate evidence to the CFTC of any payments made pursuant to such agreement. Abernethy shall also notify the CFTC of any federal or state civil or criminal action related to the same activities that are the subject of this action.

4. All notices required by this Order shall identify this matter by caption and shall be sent by certified mail, return receipt requested, as follows:
Notice to CFTC:
Director, Division of Enforcement
Commodity Futures Trading Commission
1155 21st St. NW
Washington, D.C. 20581
Notice to Abernethy:
J. Vernon Abernethy
100 Glenway St. #K
Belmont, NC 28012

5. In the event that Abernethy changes his residential or business telephone number(s) and/or address(es) at any time, he shall provide written

notice of the new number(s) and/or address(es) to the CFTC within twenty (20) calendar days thereof.

6. The injunctive provisions of this Order shall be binding on Abernethy, upon any person insofar as he or she is acting in the capacity of officer, agent, servant, employee or attorney of Abernethy, and upon any person who receives actual notice of this Order by personal service, facsimile or otherwise insofar as he or she is acting in active concert or participation with Abernethy.

7. This Order incorporates all of the terms and conditions of the settlement among the parties hereto. Nothing shall serve to amend or modify this Order in any respect whatsoever, unless: (1) reduced to writing; (2) signed by all parties hereto; and (3) approved by order of this Court.

8. The failure of any party to this Order to require performance of any provision of this Order shall in no manner affect the right of such party at a later time to enforce the same or any provision of this Order. No waiver in one or more instances of the breach of any provision contained in this Order shall be construed as a further or continuing waiver of a breach of any other provision of this Order.

9. This Court shall retain jurisdiction of this cause to assure compliance with this Consent Order and for all purposes related to this action, including securing additional funds or property from third parties for satisfaction of Abernethy's

obligations for restitution and payment of his civil monetary penalty.

IT IS SO ORDERED
Dated: July 7, 2006 /s/ Robert B. Kugler
Entered: 7/07/2006 Hon. Robert B. Kugler

United States District Judge

CONSENTED AND APPROVED BY:

/s/ J Vernon Abernethy
J. Vernon Abernethy
100 Glenway St
#K
Belmont, NC 28012
(704) 865-4553
(704) 616-9494 (cell)

**Defendant, *pro se***

Dated: 4-14-06

/s/ Elizabeth M. Streit
Elizabeth M. Streit
Lead Trial Attorney

Scott R. Williamson
Deputy Regional Counsel

COMMODITY FUTURES
TRADING COMMISSION
525 West Monroe, Suite 1100
Chicago, IL 60661
(312) 596-0537 (Streit)
(312) 596-0714 (facsimile)

**Attorneys for Plaintiff**

Alison E. Shimer
1225 W. Leesport Rd.
Leesport, PA 19533

August 17, 2005

Clerk of Court
United States District Court
Mitchell H. Cohen Fed. Building & US Courthouse
1 John F. Gerry Plaza
Canden, New Jersey 08101

Dear Sir: RE: Civil Case No. 04 CV 1512

Per the telephone conference call of yesterday, August 16, 2005 by and between Magistrate Ann Marie Donio, Plaintiff CFTC, the Equity Receiver and his legal counsel, my husband Robert W. Shimer representing himself pro se and legal counsel for the Sterling entities, please be advised that I consent to defer any further consideration by the Court of my claim (Claim No 67) previously submitted to the Equity Receiver until such time as the Court rules on the two motions to dismiss previously filed by my husband in this matter currently pending before the Court and until such time as the Court also rules with respect to my husband's current motion for summary judgment also pending before the Court.

For purposes of economy I have included this letter with my separate cover letter to the Court and Challenge to Plaintiff CFTC's previous objection to my claim.

Sincerely,
/s/ Alison E. Shimer
Alison E. Shimer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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COMMODITTY FUTURES TRADING COMMISSION,

Plaintiff

Civil Action No. 04-1512

vs.

NOTICE OF APPEAL

EQUITY FINANCIAL GROUP LLC, TECH TRADERS, INC. TECH TRADER LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY

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Notice is hereby given that Alison E. Shimer ("Shimer") a non-defendant in the above matter acting pro se hereby appeals to the United States Court of Appeals for the Third Circuit from the final order of the New Jersey District Court dated December 3, 2007 and entered on December 4, 2007 referred to as Docket Entry 581 disallowing her claim to distribution as a legitimate member of the entity Shasta Capital associates, LLC ("Shasta").

Notice is hereby given that Alison E. Shimer ("Shimer") a non-defendant in the above matter acting pro se hereby appeals to the United States Court of Appeals for the Third Circuit from the final order of the New Jersey District Court

dated December 5, 2007 and entered on December 6, 2007 ordering the Equity Receiver Stephen T. Bobo, Esq. ("Receiver") to no longer hold in receivership the sum of $103,950.00 for the disputed claim of Alison E. Shimer and further ordering the Receiver to place these funds with other receivership funds for use in final distribution.

Dated December 24, 2007

/s/ Alison E. Shimer
Alison E. Shimer
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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COMMODITY FUTURES
TRADING COMMISSION

vs. **Docket No 07-478**
(D. N.J. Civ. No. 04cv-01512

EQUITY FINANCIAL
GROUP LLC, et al Petition for Rehearing
Under FRAP
& LAR 35 and 40

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## PETITION FOR PANEL REHEARING
### AND REHEARING EN BANC

Appellant Alison E. Shimer ("Shimer") represents herself pro se in the current appeal and, therefore, Third Circuit LAR 35.1 does not technically apply to her. Shimer is nevertheless fully aware of the inherent duty that she owes the Third Circuit Court as a *pro se* appellant to carefully consider and apply the rigorous requirements of Rule 35 of the Federal Rules of Appellate Procedure and LAR 35.1 to this Petition for Rehearing with respect to the Panel's grant of the Equity Receiver's Motion to dismiss her current appeal. For that reason Shimer makes the following initial statement to the Court in support of this Petition for Rehearing:

> "I, Alison E. Shimer, express a belief, based upon reasoned and studied judgment that the Order of the Panel dated May 20, 2008 granting the Equity Receiver Stephen T. Bobo's motion to dismiss my

> appeal for mootness is not only incompatible with the decision of the Supreme Court of the United States in *Church of Scientology of Cal. v. United States*, 506 U.S. 9 (1992) but is also contrary to the specific Supreme Court enunciated exception to application of the mootness doctrine discussed by the Third Circuit Court in Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003). That referenced and well recognized exception to application of the mootness doctrine was first enunciated by the Supreme Court in 1911 and acknowledged more recently by the Supreme Court of the United States to apply to *various* fact situations. Both of the above cases are cited by the Panel in its order dated May 20, 2008. Consideration by the full Appellate Court is, therefore, necessary to not only secure and maintain uniformity of decisions in this Court but to properly apply previous applicable United States Supreme Court precedent to the District Court record now before the Appellate Court."

The record in the District Court clearly indicates that "effective relief" as requested by Shimer in her appeal is not only possible but critically time sensitive if she is to have any hope of being made at least partially whole as a result of the

fraud perpetrated upon her by the defendants Coyt E. Murray ("Murray") and J. Vernon Abernethy ("Abernethy") by reason of her membership in the entity Shasta Capital Associates, LLC ("Shasta").

If the Appellate Court upholds the Panel's decision to grant the Equity Receiver's motion to dismiss Shimer's appeal, upon the availability of funds for further distribution to Shasta members by reason of the District Court's Consent Orders issued with respect to the Defendants Murray and Abernethy she will be forever barred in the future by reason of the time limits imposed by Federal Appellate Rule 4 (a)(1) (B) from later appealing the District Court's decision to exclude her from the list of Shasta members with allowed claims. For that specific time sensitive reason Appellant Shimer is not willing to direct this Petition solely to the Panel of Judges but also requests rehearing en banc.

**I. THE DISTRICT COURT RECORD INDICATES THAT THE PANEL ERRED WHEN IT STATED "THE ONLY EFFECTIVE RELIEF THAT WE COULD GRANT AFTER CONCLUDING THE DISTRICT COURT ERRED IN DENYING APPELLANT'S CLAIM WOULD BE TO DIRECT THE DISTRICT COURT TO ALLOW APPELLANT'S CLAIM, RECALL THE DISTRIBUTION FROM ALL OTHER INVESTORS, AND ORDER A RE-DISTRIBUTION THAT WOULD INCLUDE PAYMENT TO APPELLANT"**

In the "Statement of the Case" portion of her appellate brief dated February 15, 2008 Shimer informed the Court on page 3 that the defendant Murray and his affiliated companies and the defendant Abernethy all settled with Plaintiff Commodity Futures Trading Commission (CFTC) and executed consent agreements. Those consent orders were a part of the District Court record. Because the motion to dismiss Shimer's appeal was filed not by the Plaintiff CFTC *but by the Receiver* (whose arguments arguably played a significant role in the District Court's orders that are the subject of this appeal) Shimer chose in her response to focus upon the potential liability of the Equity Receiver *himself* as a less obvious reason for allowing appellate review to proceed and not granting the Receiver's Motion to Dismiss in light of the limited number of pages allowed for Shimer's response.

However, "hypothetical" the Panel or the full Court might consider such a future claim against the Equity Receiver and his firm, the lack of an equitable remedy with respect to funds already distributed to other members of the entity Shasta does not preclude an equitable remedy that addresses not only the clear possibility *but the likelihood* that additional funds will become available in the future for distribution to members of Shasta by reason of the District Court's two separate Consent Orders entered with respect to the defendants Murray and Abernethy. The language chosen by the District Court in both Consent Orders specifically provides for continued distribution of restitution funds to members of Shasta *after termination of the receivership.*

## II. A DETERMINATION OF THE CORRECTNESS OF THE DISTRICT COURT'S FINAL ORDERS THAT ARE THE SUBJECT OF SHIMER'S CURRENT APPEAL IS ABSOLUTELY CRITICAL TO ENSURE THAT SHIMER'S RIGHT IS PRESERVED TO INSIST UPON HER FAIR SHARE OF ANY SUBSEQUENT RESTITUTION PAYMENT MADE BY MURRAY, MURRAY'S COMPANIES OR ABERNETHY

Shimer's right to appellate review now of the correctness of District Court's orders denying her claim to distribution rights as a legitimate member of Shasta is critical to ensure that the Plaintiff CFTC and the Equity Receiver cannot later cite the orders of the District Court that are the focus of Shimer's current appeal as a continuing legal reason to deny Shimer participation in the distribution of funds that become available as a result of the Consent Orders issued by the District Court that imposed a continuing requirement of significant restitution upon the defendants Murray and Abernethy. Any subsequent new appeal by Shimer in the future in response to such an effort by Plaintiff CFTC or the Equity Receiver would necessarily be filed more than 60 days after the District Court's final orders issued in December of 2007 that are the subject of the current timely appeal.

In light of the fact that all other members of Shasta have received a distribution of the funds

previously held by the Equity Receiver a determination *now* by the Appellate Court that the District Court erred in excluding Shimer from that previous distribution would place Shimer at the front of the line should restitution funds from either Murray or Abernethy become available for distribution to Shasta's members. Appellate preservation of Shimer's right to participate in any such additional distribution of restitution funds from the defendants Murray and Abernethy must occur *now* or be forever and unnecessarily lost.

A. Regarding the specific provisions of the District Court Consent Order entered against Defendant Murray

The Consent Order entered by the District Court which bears Murray's signature is found in the District Court record as Document No. 514. Page 15 of Entry No. 514 imposed upon Murray's companies Tech Traders Inc. and Tech Traders, Ltd. a restitution obligation of $15,117,523.00 plus pre-judgment interest of $3,135,002.38. That same page of the consent order imposed upon Murray joint and several liability for those same amounts. Moreover post judgment interest was ordered to accrue as of the date the consent order was signed until the restitution amount is paid in full.

That same page 15 of the Consent Order further provides as follows:

"The Defendants' payments of restitution pursuant to this Order shall first be paid to the Receiver, who shall make distribution of such amounts to pool participant claimants whose claims are allowed in the claims process. *After the Final Order of distribution is entered by the Court, restitution payments shall be made on a pro rata basis according to the Final Order of Distribution to pool participants claimants with allowed claims* until those amounts (including interest) are fully satisfied, and to any other Tech Traders or Magnum pool participant who provides sufficient evidence to the Court to support a claim for restitution." (Emphasis added).

Page 16 of that same Consent Order also provides in paragraph 4 as follows:

"Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each pool participant listed on the Final Order of Distribution is explicitly made an intended third-party beneficiary of this Order and may, after termination of the Receivership, seek to enforce obedience of this Order to obtain satisfaction of any portion of the restitution which has not been paid by the Defendants."

Moreover page 16 of the Consent Order with respect to Murray requires that all payments made by either Murray or his company defendants be applied first *to their restitution obligation* required by the District Court's order before any payment is

applied to their additional disgorgement obligation and civil monetary obligation. On page 20 of the Consent Order the District Court specifically retained jurisdiction

> "...to assure compliance with this Consent Order and for all purposes related to this action including securing additional funds or property from third parties for satisfaction of the Defendants' obligations for restitution, disgorgement and payment of civil monetary penalties."

B. Regarding the specific provisions of the District Court Consent Order entered against Defendant Abernethy

The Consent Order entered by the District Court which bears Abernethy's signature is found in the record as Document No. 377. Page 8 of Entry No. 377 imposed upon defendant Abernethy a restitution obligation of $5,000,000.00 plus post judgment interest at the rate set forth in 28 U.S.C. § 1961. Moreover Abernethy specifically agreed in that Consent Order to a finding in his bankruptcy proceeding "that this restitution obligation is excepted from discharge."

Page 9 of Entry No 377 also contained provisions similar to those cited above with respect to Murray's restitution obligation that detailed how restitution payments received from Abernethy after termination of the receivership would be handled and

specifically restricted post receivership distribution of any restitution payments received from Abernethy "to claimants with allowed claims...". Entry 377 also specifically refers to the applicability of Rule 71 of the Federal Rules of Civil Procedure to "each pool participant listed on the Final Order of Distribution" and their intended third party beneficiary status.

To determine that any such future restitution payment is hypothetical and unlikely and, therefore, that an equitable remedy fashioned now by the Appellate Court to protect Shimer's right to be first in line to receive her fair share of *any restitution payment from either Murray or Abernethy in the future* is to conclude that the restitution portion of these two District Court's Orders (and, therefore, the disgorgement and civil penalty provisions of those same orders that clearly take second place to the restitution provisions of those two consent orders) was simply a convenient display of form over substance and an exercise in judicial futility. Consent Orders issued by a District Court should always carry the presumption that they are at least *partially* enforceable!

*Any enforcement at all* of the restitution provisions of these consent orders would be of benefit to Shimer if her appeal is successful and the District Court is required and directed by the Appellate Court to issue a revised order placing Shimer first in line with respect to any subsequent distribution of restitution funds that may be recovered from the Defendants Murray and Abernethy. If the Appellate

Court reverses the District Court's order with respect to Shimer's status as a member of Shasta, entitling her to distribution of restitution funds, Shimer immediately also becomes entitled by reason of the specific language of both above cited Consent Orders to any and all third party beneficiary rights conferred upon her by Rule 71 of the Federal Rules of Civil Procedure.

## III. THE CONSENT ORDERS WITH RESPECT TO MURRAY AND ABERNETHY IN THE DISTRICT COURT RECORD CLEARLY PROVIDE A SUFFICIENT BASIS UNDER SUPREME COURT AND THIRD CIRCUIT CASE LAW CITED BY THE PANEL FOR THE APPELLATE COURT TO CONCLUDE THAT THE RELIEF REQUESTED IN SHIMER'S APPEAL IS SUFFICIENTLY "EFFECTIVE" TO AVOID A DISMISSAL OF HER APPEAL FOR MOOTNESS.

A. Church of Scientology of Cal. v. United States

In its order dated May 20, 2008 granting the Equity Receiver's motion to dismiss this appeal for mootness the Panel first cited to *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). That case was cited by the Panel for the correct proposition that the mootness doctrine applies where the appellate court is unable to grant effective relief. However, as the Supreme Court clearly pointed out on page 12 of the *Church of Scientology of Cal.* opinion citing to *Mills v. Green*,

159 U.S. 651, 653, 16 S. Ct. 132, 133, 40 L.Ed. 293 (1895) the correct standard is whether the court can grant to a prevailing party "*any* effectual relief *whatever*" (emphasis added). Applying that standard to the fact that the turnover of the tape recorded conversations to IRS (which the Scientology Church sought to prevent) had already occurred while the church's appeal was pending the Supreme Court at page 13 stated:

> "When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records".

Shimer's current appeal presents a similar sort of situation in which the original action that she sought to prevent has already occurred: final distribution in late December of 2007 to all other members of Shasta of her funds held by the Equity Receiver Stephen T. Bobo. However, per the clear ruling in *Church of Scientology of Cal.*, the fact that it is impractical and now impossible to reverse *that particular action* by the Equity Receiver does not compromise the Appellate Court's ability to protect Shimer's continued interest in being not only able to participate in restitution distributions when they occur but to be placed at the front of that line and receive her allotted distribution share previously denied her by the District Court *before any future restitution distribution occurs to other members of Shasta. That relief* is readily available and can be

easily fashioned by the Appellate Court to protect Shimer's continuing interest to participate in restitution distributions.

Per the Supreme Court's analysis in *Church of Scientology of Cal.* such equitable relief, if granted after consideration of the merits of Shimer's appeal, is sufficiently "effective" to avoid dismissal on the grounds of mootness. The guideline with respect to instances similar to Shimer's is clear: when "...it is too late to prevent, or to provide a fully satisfactory remedy...a court does have power to effectuate a partial remedy..." *Church of Scientology of Cal.* at page 13. **Shimer's unwillingness to pursue equitable relief with respect to the distributions made to other members of Shasta in late 2007 was merely a realistic acceptance of what was clearly already an accomplished fact—the issuance of final checks to all other members of Shasta by Stephen T. Bobo the Equity Receiver. That attitude on the part of Shimer clearly does not preclude such other appropriate equitable relief as the Appellate Court might fashion upon review of the Consent Orders of the District Court that are an obvious part of the available record.**

B. Donovan

The Panel also cited to *Donovan v. Punxsutawney Area Sch. Bd.* 336 F.3d 211, 216 (3d Cir. 2003) in further support of its willingness to grant the Equity Receiver's motion to dismiss Shimer's current appeal as moot. *Donovan* was an

appeal from the District Court's denial of the appellant's motion for preliminary injunction. The *Donovan* Court's *sua sponte* discussion of mootness does not support the Panel's decision dated May 20, 2008 but, instead, actually provides further support for reversing the Panel's decision. *Donovan* began its discussion of mootness at page 216 by citing to *Powell v. McCormack*, 395 U.S. 486, 496 (1969) and quoted the following from that Supreme Court case:

> "[A] case is moot when the issues presented are no longer 'live' or the parties *lack a legally cognizable interest in the outcome*." (Emphasis added)

How is it possible to conclude that Shimer has no "legally cognizable interest in the outcome"? She has diligently pursued this appeal citing the erroneous nature of the District Court's two orders now the subject of this appeal and further pointing out the injustice of the District Court's willingness (at the urging of the Equity Receiver) to remove Shimer from the list of Shasta members entitled to a distribution of funds held by the Receiver in late 2007. Her interest in being admitted to the group of Shasta members entitled to further restitution distribution per the two Consent Orders cited previously is clearly understandable, recognizable and urgently necessary if she is to be made partially whole from a further distribution of restitution funds that become available from either Murray or Abernethy as specifically ordered by the District Court.

What is even more instructive about the applicability of the mootness analysis found in the *Donovan* decision to the present matter now before the Court is the *Donovan* court's cite to *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1113-1115 (3d Cir. 1992) and this Circuit's apparent willingness to consider the Supreme Court's recognized (though admittedly narrow exception to the mootness doctrine) to a decision or behavior by a school or school board that would otherwise be considered moot because of the appellant student's graduation before the case could be decided. The possibility of applying that narrow exception to the mootness doctrine to the claims of a student against his school or school board was considered by the *Donovan* Court if the basis for the student's claims are "capable of repetition, yet evading review" citing to *Brody* at pages 1113-1115.

The *Donovan* opinion cited by the Panel noted at page 217 that the stated exception is available

> "...only where: 1) the challenged action is too short in duration to be fully litigated before the case will become moot; and 2) there is a reasonable expectation that the complaining party will be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed. 2d 350(1975) (per curiam)."

It is worth noting here that the *Weinstein* Court at page 148 referred to the history of the

"capable of repetition, yet evading review" branch of the law of mootness and noted that the first case to enunciate that now well recognized and established exception when mootness might otherwise apply was *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). There it was the *probability* that the same party would "...be subject to the same kind of order in the future..." that allowed appellate review to occur even though the order in question that was the subject of that particular appeal "...had expired of its own terms." The *Weinstein* Court at page 149 cited further to the cases of *Moore v. Ogilvie*, 394 U.S. 814 (1969); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); and *Dunn v. Blumstein*, 405 U.S. 330 (1972) as examples of several cases that had applied the mootness exception concept first enunciated in *Southern Pacific Terminal* "...to different fact situations...".

This Circuit's *Donovan* decision clearly indicated on page 217 after citing to *Weinstein* that the first test *might be satisfied* under the facts in Donovan because of this Court's previous conclusion in *Brody* that

> "...the challenge to religious speech in a graduation ceremony by students who had not yet graduated was not moot because the length of the senior year was 'clearly too short to complete litigation and appellate review of a case of this complexity,' *Brody*, 957 F. 2d at 1113 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 186 n.9, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). (1982)..."

However *Donovan* concluded at that same page 217 that the other prong of the test for excepting application of the mootness doctrine was apparently *not* met under the facts in *Donovan* because:

> "A case challenging PAHS's ban of the Bible club from the activity period will not always evade review. A PAHS sophomore, for example, who challenges the ban would enjoy a three year window in which to litigate the issue to completion."

The record in the current appeal by Shimer satisfies both prongs of the test discussed by *Donovan* and applied by *Brody* to prevent application of the mootness doctrine. The issuance of all final distribution checks by the Equity Receiver at the end of 2007 occurred very shortly after the issuance of the District Court orders that are the subject of this appeal. All checks were quickly cashed by those members of Shasta—clearly a period of time far less than "the length of the senior year" in *Brody*. Moreover, clearly if Shimer's appeal is not heard *now* legal review of the District Court's orders will be forever lost. Who else will ever assert on behalf of Shimer the issues she now raises by her current timely appeal?

The other prong is also satisfied by reason of the Consent Orders previously discussed in this Petition because there is clearly "a reasonable

expectation that the complaining party will be subjected to the same action again". Clearly the injustice inflicted upon Shimer by the District Court's two orders excluding her as a legitimate member of Shasta entitled to receive a distribution of available funds thereby at least making her partially whole for the fraud perpetrated upon her and admitted by both Murray and Abernethy *is clearly capable and arguably likely of being repeated.* If the merits of Shimer's appeal are not heard and decided now, she will forever lose her right to participate with other members of Shasta in later restitution distribution that occurs pursuant to the District Court's Consent Orders. Such a likely scenario would clearly constitute a repetition of the same injustice inflicted upon her by both the Equity Receiver and the District Court in late 2007. Clearly there is a "reasonable expectation" the civil remedies reflected in a Consent Order will be enforced and will be at least partially available to injured parties for whose benefit the consent order was issued.

The Panel's final cite to *In re Cantwell* 639 F. 2d 1050, 1054 (3d Cir. 1981) clearly provides no precedent to overcome the arguments, facts and case law cited above in this Petition for Rehearing. Shimer adequately distinguished *In re Cantwell* from the current matter before the Court on page 8 of her Response dated March 11, 2008.

## IV. CONCLUSION

A decision by the Appellate Court 1) that Shimer was a legitimate member of the entity

Shasta; 2) that the District Court erred in refusing to allow Shimer to participate in the final distribution made in late 2007 by the Equity Receiver, and 3) that Shimer's claim should be allowed would not be a mere "advisory opinion". Such a determination and the subsequent issuance of an appropriate order to the District Court would:

1) preserve Shimer's right to be considered a legitimate member of the entity Shasta in the likely event that restitution funds from Murray and/or Abernethy become available for further distribution to members of Shasta as a result of the Consent Orders previously issued by the District Court;

2) prevent Shimer's exclusion from future distribution of restitution funds that result from compliance by defendants Murray and Abernethy with the District Court's Consent Order;

3) place Shimer in the front of the line with respect to any future restitution distribution to first receive the distribution previously denied her by both District Court's orders that are the subject of this appeal; and,

4) confer upon Shimer specific third party beneficiary rights pursuant to Rule 71 of the Federal Rules of Civil Procedure made available to all other Shasta members whose claims were allowed per the District Court's Consent Orders found in the record as Documents 514 and 377.

Such relief to Shimer is neither hypothetical nor is it ineffective. Shimer, therefore, respectfully requests that the Panel's previous grant of the Equity Receiver's motion to dismiss her appeal for mootness be reversed, that Shimer's appeal be permitted to proceed and that the CFTC as appellee be directed to file a timely formal brief in response to Shimer's brief as required by the Federal Rules of Appellate Procedure.

Dated June 18, 2008

Respectfully submitted,

/s/ Alison E. Shimer

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No. 08-462

# In the Supreme Court of the United States

ALISON E. SHIMER, PETITIONER

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

Respondent Commodity Futures Trading Commission brought a civil enforcement action for fraud against petitioner's husband and others resulting in an award of restitution to customers. The district court disallowed petitioner's restitution claim and ordered the court-appointed receiver to distribute assets held for restitution to the remaining claimants without reserving funds for petitioner. Petitioner did not seek a timely stay. The question presented is as follows:

Whether petitioner's appeal from the district court's distribution orders became moot when (1) the assets in question were distributed to the other customers, (2) petitioner expressly disclaimed any request that the distributed funds be recalled, and (3) petitioner informed the court of appeals that she merely sought a legal ruling that the district court had erred in denying her claim because such a ruling would be helpful to her in potential future litigation against the receiver.

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The order of the court of appeals (Pet. App. 4a-6a) is not reported. The orders of the district court (Pet. App. 9a-18a) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on May 20, 2008. A petition for rehearing was denied on July 8, 2008 (Pet. App. 7a-8a). The petition for a writ of certiorari was filed on October 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In August 2004, the Commodity Futures Trading Commission (CFTC) filed an amended complaint in federal district court against Robert W. Shimer, petitioner's husband. The complaint alleged that Mr. Shimer

and a number of entities and other individuals had participated in a scheme to commit fraud in a commodity investment scheme, in violation of 7 U.S.C. 6b(a)(2) and 6o. R. 64. Several defendants eventually entered into consent agreements with the CFTC, Pet. App. 19a-60a, while other defendants, including Mr. Shimer, proceeded to trial. With respect to the latter group of defendants, the district court entered judgment in favor of the CFTC on February 4, 2008. *CFTC* v. *Equity Fin. Group, LLC*, 537 F. Supp. 2d 677, 678 (D.N.J. 2008).

2. During the course of the district court proceedings, certain assets were placed under the control of a court-appointed receiver, Stephen T. Bobo (the Receiver), for ultimate distribution as restitution to victimized customers. R. 6. As part of the investor claim process, petitioner filed a claim with the Receiver for $150,000, based on an investment she had allegedly made in a commodity pool connected with the fraudulent scheme. R. 116, 572. Petitioner stated in her claim form that "I am married to Robert Shimer but this investment was intended to be mine in my name only." R. 572. Petitioner later explained that she had made the investment "in good faith" and asked not to be punished "solely because [her] husband [wa]s a defendant" in the underlying enforcement action. R. 116.

Both the Receiver and the CFTC objected to petitioner's claim. R. 153, 210, 572. They noted that the money invested by petitioner had originated from a joint checking account held in the names of Robert and Alison Shimer, an account that also received monies from other businesses controlled by Mr. Shimer as part of the fraudulent commodities scheme. R. 572. Because the amounts received from the scheme that were held in the Shimers' joint account exceeded the amount of the

claimed investment, the Receiver and the CFTC argued that petitioner's claim should be denied.[1] The Receiver and the CFTC also argued that it "would be inequitable" to allow petitioner to recover her claimed investment because she had involved herself with the affairs of some of the defendant entities and had "wrongfully profited" from her husband's fraudulent conduct at the expense of innocent investors. *Ibid.*

In light of those objections, the Receiver classified petitioner's claim as "disputed" and set aside approximately $103,950 for possible payment pending resolution of the disputed claim by the district court.[2] R. 555; Pet. App. 10a-11a. On November 13, 2007, the Receiver filed a motion with the district court requesting that it resolve petitioner's claim and disallow recovery so that he could close the receivership estate. R. 572. Petitioner filed a response opposing the Receiver's motion. R. 578.

On December 3, 2007, the district court issued an order disallowing petitioner's claim in its entirety. Pet. App. 12a. Two days later, the court noted that "the disputed claim of [petitioner] has been disallowed," and it ordered that the $103,950 previously set aside be released and combined with other receivership funds for final distribution to the other claimants. *Id.* at 17a-18a. Pursuant to the district court's orders, the Receiver dis-

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[1] Petitioner stated on her claim form that the source of the investment was "financing of property." R. 572. When objecting to petitioner's claim, the Receiver noted that the source of that financing was a mortgage on a piece of property that Mr. Shimer had recently inherited from his father. *Ibid.* Petitioner became a joint owner of the mortgaged property only after Mr. Shimer transferred part of his interest to her. *Ibid.*

[2] That amount represented a pro rata share, among all claimants, of the available receivership assets.

tributed the remaining funds in the receivership estate to eligible claimants on December 20, 2007. Pet. 10.[3]

3. On December 26, 2007, petitioner filed a notice of appeal from the district court's December 3 order disallowing her claim and the December 5 order releasing the funds previously set aside for her claim. Pet. App. 62a-63a. Petitioner also filed in the court of appeals a motion, dated December 24, 2007, to stay the two orders pending appeal.

a. On January 17, 2008, the court of appeals denied petitioner's motion for a stay. R. 592. The court held that the motion to stay was moot "because the receiver already has mailed the final distribution checks." *Ibid.* To the extent that petitioner sought an order "requiring the receiver to stop payment on those checks," the court refused to grant such relief. *Ibid.* The court of appeals also found that petitioner had neither sought a stay (timely or otherwise) in the district court nor shown "that doing so would have been impracticable." *Ibid.* (citing Fed. R. App. P. 8(a)(1)(A)). Finally, the court held that petitioner had failed to show that "the relevant factors weigh in favor of granting relief." *Ibid.*

b. On March 7, 2008, the Receiver filed a motion to dismiss petitioner's appeal as moot. The Receiver argued that because the receivership funds had already been distributed, the only effective remedy that could be afforded petitioner was no longer practicable. The CFTC also filed a motion to dismiss petitioner's appeal on the same mootness grounds.

In response, petitioner acknowledged that the receivership monies had been distributed without payment of

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[3] In addition to the orders described in the text, the district court signed an additional order on December 4, 2007, authorizing the Receiver to close the receivership estate. Pet. App. 13a-16a.

her claim. She stated, however, that she was not seeking a remedy that would undo the completed distribution or otherwise "require the Receiver to undertake the recovery of funds [already] disbursed." Pet. C.A. Br. Responding to Receiver's Mot. to Dismiss 5. Rather, petitioner argued that her appeal was not moot because a legal ruling in her favor, holding that the district court had erred in denying her claim, would provide her "with that first necessary step in determining if subsequent legal action is appropriate and feasible against the Receiver and his firm for irresponsibly suggesting the course of action taken by the District Court." *Id.* at 3; see *id.* at 7 ("A decision now from the Appellate Court that concludes no sound legal or equitable basis existed for ordering funds * * * to be released * * * is all the relief Appellant seeks. [Such a decision] would simply allow 'the chips to later fall where they may' in any later legal action that may be brought by [petitioner] against the Receiver and his firm.").[4]

On May 15, 2008, the court of appeals issued an unpublished order granting the motion to dismiss petitioner's appeal on constitutional mootness grounds. Pet. App. 4a-6a. The court explained, that because the receivership funds had already been distributed, the "only effective relief that [the court] could grant would be to direct the District Court to allow [petitioner's] claim, recall the distribution from all other investors, and order a re-distribution that would include payment to [petitioner]." *Id.* at 5a. The court stated, however, that it

[4] Petitioner made similar contentions in her opening appellate brief on the merits. See Pet. C.A. Br. 30 ("It should never be 'moot' for the Appellate Court to correct previous incorrect legal decisions of the district courts simply because the Appellate Court may not be able to provide an appropriate equitable remedy.").

need not determine whether such relief could be appropriate because petitioner had "expressly disclaimed" any request for that remedy. *Ibid.* Instead, petitioner simply sought a "legal ruling that the District Court erred in denying her claim." *Id.* at 5a-6a. The court of appeals held that it lacked authority to issue what would be, in effect, an advisory opinion, *id.* at 6a (citing *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992)), and it rejected petitioner's contention that a favorable ruling would be of "practical consequence to her by allowing her to consider bringing a hypothetical and unidentified claim against the Receiver, whose conduct is not at issue in this appeal," *ibid.*

c. On July 8, 2008, the court of appeals denied without substantive analysis petitioner's request for rehearing and rehearing en banc. Pet. App. 7a-8a.

## ARGUMENT

The court of appeals correctly held that petitioner's appeal was moot because the only relief she requested was, in effect, an advisory opinion that the court lacked authority to issue. That decision does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Contrary to petitioner's contention (Pet. 12-22), the ruling below is fully consistent with this Court's decision in *Church of Scientology* v. *United States*, 506 U.S. 9 (1992). At issue in *Church of Scientology* were copies of two tapes that included recorded conversations between church officials and their attorneys. Over the church's objection, the district court granted the request of the Internal Revenue Service (IRS) for an order compelling production of the tapes. While the church's appeal from the district court's order was pending, copies

of the tapes were delivered to the IRS. Finding that a justiciable controversy no longer existed, the court of appeals dismissed the appeal as moot. *Id.* at 10-12.

This Court reversed. Even though the tapes had already been delivered to the IRS, the Court held that a ruling favorable to the church would still provide "*some* form of meaningful relief in circumstances such as these." *Church of Scientology*, 506 U.S. at 12-13. Specifically, the Court found that if the church were to prevail, "a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot." *Id.* at 13.

Here, by contrast, the court of appeals correctly concluded that no effectual relief would be available if it ruled in petitioner's favor. As petitioner, the Receiver, the CFTC, and the court of appeals all recognized, the relevant restitution checks have already been disbursed by the Receiver. Pet. App. 5a. While attempting to reclaim those payments from their various recipients would be of dubious practicality, petitioner expressly denied, and continues to deny, that she is seeking any such relief. *Ibid.*; see Pet. 18. Instead, petitioner informed the court of appeals that she merely sought a legal ruling in her favor so that she could use it as a basis for a potential future lawsuit against the Receiver. Pet. App. 5a-6a. Such a ruling, unaccompanied by any tangible remedy, would not constitute "meaningful" or "effectual" relief under this Court's longstanding precedents. Rather, as the court of appeals correctly observed, what petitioner requested was in substance an advisory opinion, relief that the court of appeals lacked

authority to grant. *Id.* at 6a; see, *e.g.*, *Church of Scientology*, 506 U.S. at 12.[5]

2. Petitioner also contends (Pet. 14-22) that her appeal is not moot because a favorable decision on the merits would entitle her to portions of any future restitution payments made by two defendants in the underlying action who have executed consent agreements with the CFTC. Because that argument was not raised until the petition for rehearing and rehearing en banc (Pet. App. 64a-82a), it is not properly before this Court. In any event, the contention is without merit.

a. Petitioner acknowledges that her argument based on possible entitlement to future restitution payments from the two defendants was first made in her petition for rehearing and rehearing en banc. See Pet. 15 ("It is true that a more persuasive argument for appellate jurisdiction was probably made in the petition for en banc review than in Petitioner's response to both Mr. Bobo's and the Respondent's motions to dismiss for mootness."). Courts of appeals are not obligated to address matters that are not timely raised, and they ordinarily decline to consider claims raised for the first time in a petition for rehearing. See, *e.g.*, *Peter* v. *Hess Oil V.I.*

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[5] To the extent petitioner contends (Pet. 15) that the court of appeals' decision is inconsistent with *Donovan* v. *Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003), any such intra-circuit conflict does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict between the Third Circuit's decisions in *Donovan* and in this case. In both cases, events that took place after a district court's entry of judgment prevented the court of appeals from being able to grant a form of relief requested by the aggrieved party. In *Donovan*, the event was appellant's graduation from high school; in this case, it was the completed distribution of restitution checks by the Receiver. See *Donovan*, 336 F.3d at 216-217; Pet. App. 5a-6a.

*Corp.*, 910 F.2d 1179, 1181 (3d Cir. 1990) (refusing to consider an argument raised for the first time in a petition for rehearing when there was "no legitimate excuse for failing to raise this argument in a timely manner"), cert. denied, 498 U.S. 1067 (1991); *Easley* v. *Reuss*, 532 F.3d 592, 593-594 (7th Cir. 2008) ("Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing."); *United States* v. *Levy*, 416 F.3d 1273, 1275-1276 (11th Cir.) (per curiam), cert. denied, 546 U.S. 1011 (2005). Consistent with that usual practice, the court of appeals denied petitioner's rehearing request without substantive comment. See Pet. App. 7a-8a.[6]

It is also well settled that this Court rarely reviews matters that were not properly raised below or passed upon by the court of appeals. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); see also *Wills* v. *Texas*, 511 U.S. 1097, 1097-1098 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below. Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of [the rule] to the facts of petitioner's case.") (internal citation omitted). Because petitioner's argument was not timely raised below and was not passed upon by the court of appeals, it is not properly before this Court and does not warrant review.

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[6] For the reasons discussed in the text, petitioner's claim that the "denial of her petition for rehearing was an unjustified abuse of discretion," Pet. 13, also lacks merit and does not warrant this Court's review.

b. In any event, petitioner's argument lacks merit. In an effort to show a continuing personal interest in the effect of the district court orders from which she appealed, petitioner relies on consent agreements entered into by two defendants in the underlying action that require restitution beyond that already distributed by the Receiver. Petitioner identifies no evidence or other information indicating that arrangements for payment of restitution by those defendants have been established or that the defendants possess assets that would make restitution possible. Indeed, as petitioner acknowledges, "no funds exist at the moment" with respect to those potential restitution payments. Pet. 21.

3. Petitioner's remaining contentions—that the court of appeals was required to exercise jurisdiction (Pet. 23-24) and that petitioner was denied due process (Pet. 25-27)—lack merit and do not warrant this Court's review. For the reasons set forth above, the court of appeals correctly determined that petitioner's appeal was moot. The court therefore correctly declined to exercise jurisdiction, and petitioner was not denied due process of law.

4. Petitioner raises no issue of general significance, but simply contends that the court of appeals misapplied settled legal principles to the unusual facts of this case. The court below was clearly correct in stating that, if an intervening event "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." Pet. App. 5a (quoting *Church of Scientology*, 506 U.S. at 12). Petitioner does not dispute that articulation of the governing legal standard, but simply argues that effectual relief was in fact possible here notwithstanding the distribution of the receivership funds. Even if petitioner's argument on

that point were more persuasive, it would raise no legal issue of broad and recurring importance.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-462

IN THE

# Supreme Court of the United States

ALISON E. SHIMER,
*Petitioner,*

COMMODITY FUTURES TRADING COMMISSION
*Respondent*

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**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Date: January 5, 2009

## QUESTION PRESENTED

1. Whether the case law cited in Respondent's brief in opposition provides any support at all for the proposition that federal appellate jurisdiction, though present, may be ignored and effectively denied because its presence was not made clear and obvious to the appellate court until the filing by Petitioner of a timely petition for rehearing.

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IN THE

# Supreme Court of the United States

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***Respondent***

---

**On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit**

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

Respondent's brief in opposition asks this Court to ignore over 150 years of consistent and unswerving support for the well established requirement that once established to the satisfaction of this Court and every other federal appellate court appellate jurisdiction cannot be avoided or ignored (see cases cited in the previously filed petition).

Respondent's primary argument in opposition to grant of the petition now before this Court is the fallacious attempt to equate the issue of appellate jurisdiction to arguments or issues that might affect success on the merits of a particular appeal. To that end on page 8 of its brief Respondent cites to *Peter v. Hess Oil V.I. Corp.*, 910 F.2d 1179, 1181 (3d Cir. 1990) for the general proposition that "Courts of appeals are not obligated to address matters that are not timely raised, and they *ordinarily* decline to consider claims raised for the first time in a petition for rehearing". (Emphasis added).

In *Peter* the plaintiff Conrad Peter had filed a common law tort law suit against Hess Oil Virgin Islands Corp. In his appellate brief he had failed to argue the inapplicability of the Longshore and Harbor Workers' Compensation Act ("LHWCA") to the territorial waters of the Virgin Islands. The appellate court held (in the absence of any argument in Peter's brief to the contrary) that the LHWCA applied and preempted his common law tort cause of action.

It is also worth noting that in justifying its refusal to grant panel rehearing on whether the LHWCA applied to the territorial waters of the Virgin Islands the appellate court also summarily rejected counsel's contention the LHWCA issue impacted the subject matter jurisdiction of the appellate court: "We have jurisdiction to decide this appeal without regard to whether LHWCA applies or does not apply to the territorial waters of the Virgin Islands. See 28 U.S.C. Sec 1294(3)." *Peter* at 1181.

Clearly *Peter* is insufficient precedent for permitting an appellate court to literally *ignore* its own appellate jurisdiction when a sufficient basis for finding such jurisdiction to exist is cited in a timely filed petition for rehearing. The "claim" of Petitioner Shimer in her reply to the Receiver Stephen T. Bobo's motion to dismiss was that mootness did not apply to her appeal. That there might be another alternative (and perhaps more forceful reason) for recognizing the existence of appellate jurisdiction is clearly not only an appropriate but a *necessary* reason to file a petition for rehearing.

The general principle that an issue not addressed initially in an appellate brief will usually not be reviewed in a later petition for rehearing certainly makes great practical sense when the issue or argument not properly raised and briefed goes to the merits of the matter appealed. Otherwise the inadvertence of counsel becomes a basis for unreasonably and unnecessarily extending the process and duration of appellate review. That is not the case in the matter now before this Court. The issue of mootness was first raised in the Receiver's motion to dismiss filed *after* submission of Petitioner's brief addressing the merits of her appeal.

The underlying justification for support for the proposition that "Panel rehearing is not a vehicle for presenting new arguments..." *Easley v. Reuss*, 532 F.3d 592, 593-594 (7th Cir. 2008) cited on page 9 of Respondent's brief apparently lies in the general principle of waiver. It is reasonable to conclude that an issue not properly raised at its appropriate time during the appellate process need not be later

considered on a petition for rehearing. But the 7th Circuit Court recognized (as indicated in the entire quote from *Easley* on page 9 of Respondent's brief) that "extraordinary circumstances" might permit exception to that otherwise generally accepted rule.

The erroneous nature of a previous denial of appellate jurisdiction clearly qualifies as a "circumstance" of sufficient extraordinary nature to not only permit but to arguably *require* application of the exception noted in *Easley*. A grant of the petition now before this Court would not disturb or impair *in any way* the propriety of the rehearing petition denials of either *Peter* or *Easley*[1] nor would it be inconsistent with the per curiam decision of this Court in *United States v. Levy*, 416 F.3d 1273, 1275-1276 (11th Cir.) (per curiam), cert denied, 546 U.S. 1011 (2005).[2]

On page 5 of its brief the Respondent seeks support for its argument that Petitioner sought only an advisory opinion from the appellate court by citing to the fact that her appellate brief did not specifically outline and describe to the appellate court all of the possible equitable remedies that *might* flow from a merits based decision in her favor. On that page 5 of Respondent's brief we find

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[1] In *Easley* the petition for rehearing was denied for failure to initially brief or argue before the appellate court the state-created danger exception to the Due Process clause.

[2] Defendant Levy's conviction for conspiracy to commit mail fraud and money laundering was affirmed and then his petition for rehearing was denied for failure to assert in his appellate brief a claim of error per *Blakely v. Washington* 542 U.S. 296 (2004).

reproduced for the Court a sentence from Petitioner's appellate brief where she stated that the relief sought in her appeal was "A decision...that concludes no sound legal or equitable basis existed for ordering funds... to be released... ."

The Respondent has cited to this Court no decision of any court that requires Petitioner to lay out and provide to the appellate court *all of the possible equitable remedies* that might flow from a decision in her favor on the merits of her appeal. Petitioner only acknowledged in her appellate brief the practical impossibility of fashioning any equitable relief *that included a recall of funds already distributed by the Receiver* per the order of the district court.

It was completely appropriate in the context of the jurisdictional issue now presented to this Court for the Petitioner to remind the appellate court in a timely fashion in her petition for rehearing what was already apparent from the record: the consent orders of the district court were sufficient *on their face* to allow Petitioner (if successful on the merits) a remedy sufficient under the standard enunciated in *Mills v. Green,* 159 U.S.651 (1895) to avoid application of mootness to her appeal.

If the appellate court itself is without power or authority to deny or refuse jurisdiction once it is clearly established to exist under case law precedent of this Court, how is it possible to ever apply a "timeliness" standard to the issue now raised by Petitioner Shimer and conclude that *at any time during the appellate process* she was capable of

waiving or abandoning a right to insist upon that which the appellate court had no power to refuse or deny?

Neither *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147n. 2 (1970) nor *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992) preclude grant of the petition now before this Court.[3] The failure of the appellate court to address the jurisdictional question raised by Shimer's petition for rehearing was clear reversible error in light of previous decisions of this Court that emphasize the *necessity* of accepting appellate jurisdiction when it is found to exist.

Justice O'Connor's expressed concern in *Wills v. Texas*, 511 U.S. 1097,1097-1098 (1994) cited by Respondent on page 9 about the usual preference for having the benefit of the appellate court's "...application of [the rule] to the facts..." need not apply when the issue is purely a question of federal jurisdiction. Justice O'Connor's cited remarks in *Wills* were addressed to the absence of any decision by the state appellate court that applied the facts in *Wills* to the defendant's claim that the jury should have been provided the opportunity to give mitigating effect to his mental retardation at capital sentencing. In the present matter this Court has all

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[3] As noted by Respondent this Court refused in *Adickes* at 147, fn 2 to consider that petitioner's challenge to the district court's denial of a request to amend her complaint to include a third count when that alleged error by the district court was never argued before the court of appeals. In *Taylor* this Court refused to entertain a new argument by a trustee in bankruptcy not set forth in the petition for certiorari citing to the provisions of Rule 24.1(a).

that it needs in the record before it to apply its own previous precedent and determine if the appellate court's refusal to review Shimer's petition for rehearing and accept jurisdiction was proper and acceptable.

It was appropriate, proper and timely for Petitioner to point out to the appellate court in her petition for en banc rehearing that appellate jurisdiction indeed existed. It was inappropriate and an abuse of its discretion for the appellate court to refuse to recognize its jurisdiction with respect to Petitioner Shimer's appeal when a firm and sound basis for that jurisdiction was presented in her petition for en banc review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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